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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*,

vs.

THE CHOCTAW NATION, THE CHICKASAW NATION, AND THE UNITED STATES.

No. 338.

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vs.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE WICHITA AND AFFILIATED BANDS OF INDIANS.

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STATEMENT OF THE CASE.

In 1803 the United States acquired from France the Province of Louisiana, extending from the Mississippi to an indefinite western boundary. Its interior was utterly unknown, even to the few whites who lived upon its eastern borders and traded with the Indians who inhabited it. White settlement was pressing on the tribes who lived east

of the Mississippi, and especially upon the Choctaws, who were residents of the (now) State of that name, and it became necessary for the peace of the locality that a new home should be found for them. With this end in view measures were taken to extinguish the Indian title west of the great river. First, by a treaty made in 1808 (7 Stat., 107), the Osages ceded those portions of Missouri and Arkansas lying between the rivers bearing those names; while in 1818 they ceded a small tract north of the Arkansas in the northeast corner of the Indian Territory. (7 Stat., 183.)

On the 24th day of August, 1818, a treaty was made with the Quapaws, a tribe consisting of about one thousand Indians, living on the Arkansas river, near its mouth, by which they ceded to the United States lands bounded as follows:

> Beginning at the mouth of the Arkansas River; thence extending up the Arkansas, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red River, and down the middle of that river to the Big Raft; thence, a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansas.

In addition certain lands east and north of the Mississippi and Arkansas rivers were quit-claimed, as are shown on the map accompanying the treaty and printed in the Government brief (7 Stat., 176), and by the red line on the map at the end of this brief.

The following year a treaty was made with the King of Spain, which was immediately ratified by this country, although the Cortez did not authorize its ratification until the fall of 1820 and these were not exchanged until February, 1821. This treaty placed the boundary between the American and Spanish possessions, at the one-hundredth meridian, at the latitude of the Quapaw cession.

In the meantime a treaty was made with the Choctaw Nation, by which it ceded its lands east of the Mississippi River, and in consideration therefor received the western portion of the Quapaw tract, which grant was limited, by a subsequent treaty made with the Choctaws, in 1830, to the western limits of the United States, or longitude 100, as fixed by the Spanish treaty.

This paper title of occupancy remained in the Choctaws, subject to an interest to which the Chickasaws were admitted in 1837, up to the time of the treaty made in 1855 between the United States and the two last-mentioned tribes. West of the Cross Timbers, however, the emigrant tribes, as they were called, had never settled; that is, essentially, west of the 98th meridian. What tribes really occupied that country the Government did not know, when it made the various treaties, with the Quapaws, in 1818, and with the Choctaws, in 1820 and 1830, nor does it seem to have cared, until later exigencies forced the matter upon its attention.

Important among these was the admission of Texas into the Union in 1845, and the necessity of taking care of the Indians who inhabited its territory. By the agreement of annexation Texas retained all of her public lands,* and the United States had none there for Indian reserves.

By the treaty of Council Springs, made in 1846, with the Indians of Texas and its neighborhood, the Texas Indians acknowledged themselves subject only to the United States, and the latter declared its sole right to regulate

* "Said State * * * shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of the said republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct." (5 Stat., 798.)

trade and intercourse with them. Among these Texas Indians were the affiliated bands who are parties to this cause. The gradually extending boundaries of white settlement in Texas so encroached upon them that, in 1854, the Government made an arrangement with the State to set aside a reservation on the Brazos, near the mouth of Clear Fork; here the affiliated bands were colonized, and with such good results that Agent Neighbors, in charge of the Texas Indians, being in Washington, in 1855, suggested to the Indian Department the propriety of leasing from the Choctaws a part of the country around the Wichita mountains for the settlement of the Wichitas and roving prairie Indians.* At this time the Wichitas and some Wacos were living just east of the 98th meridian about midway between the Red and Washita rivers. The rest of the affiliates were in Texas.

This residence of the Wichitas, north of Red River and west of the Cross Timbers, had been continuous for nearly a century, although some members of the tribe had from time to time lived and hunted in Texas, which was separated from their true habitat but by a shallow, fordable stream.

In pursuance of Neighbors' suggestion a lease of the lands between the Red and Canadian rivers and the 98th and 100th meridians was made by the Choctaws and Chickasaws to the Government, as a part of the treaty of 1855, its object being, as therein stated:

> For the permanent settlement of the Wichita and such other tribes of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges

*Sen. Ex. Doc. No. 13, 48th Cong., 1st Sess., p. 15.

> are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government. (11 Stat., 611.)

Under this lease the Government, so far as the Choctaws and Chickasaws were concerned, had placed at its disposition a large tract of land, which enabled it to do justice to the Wichitas, by providing them a permanent home, free from molestation, on the lands which they had always occupied, and which the United States, in ignorance of the fact, had ceded to the Choctaws.

The affiliated bands continued to live on the Brazos reservation, constantly improving in condition and peacefully, until 1859, when they were attacked by white desperadoes who conspired to drive them out of the State, and so much trouble was caused that the Government concluded to locate them north of Red River, with the Wichitas.

The leaders of the various tribes were therefore brought together at Fort Arbuckle in the Chickasaw Nation, and it was agreed that the Texas Indians should cross the Red River to live with the Wichitas, and a location for their villages was selected between the Washita and Canadian rivers, on the lands at issue in the present cause. The limits of the present reservation were not laid out, however, until later.

During the civil war the Wichitas and affiliated bands remained loyal to the Government, and were forced to seek refuge in Kansas. They returned to their recent homes, after several years of great privation, in the latter part of 1867, and settled down to the planting of their crops, for they were agricultural in their habits.

The Choctaws and Chickasaws, however, joined forces with the South during the contest, being slaveholders, and when it was terminated it became necessary to readjust their treaty relations with the Government. This was done in 1866, when they *ceded* the so-called Leased District to the United States. (14 Stat., 769.)

In 1867 the greater and southern portion of this district was set apart by agreement to the Kiowa and Comanche Indians (15 Stat., 581), while most of the balance was reserved to the Cheyennes and Arapahoes, by executive order of August 10, 1869.

In 1872 some of the headmen of the Wichita and affiliated bands were brought to Washington, and an agreement was entered into between them and the Commissioner of Indian Affairs, in which the present reservation was laid out and given to the Indian signatories as a home. Congress, however, did not ratify this agreement, although the Executive called it to its attention several times, but it did, by its acts of appropriation, recognize the reservation as in existence.

In 1889 (by the Indian Appropriation Act, approved March 2; Sec. 14) Congress provided for a commission to treat with the Cherokees and other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, for the cession of their title, claims or interest therein to the United States. This commission concluded an agreement with the Cheyennes and Arapahoes on the 13th day of November, 1890, which was transmitted to Congress and approved by the Act of March 3, 1891. (26 Stat., 1022.)

In the spring of that year, the commission visited the Wichita and affiliated bands of Indians, and proposed to them that an agreement should be made between them and the United States whereby they should cede their reserva-

tion to the Government, and be each allotted one hundred and sixty acres of land within the reservation limits, and that the Government should pay them $286,000, of which $53,000 should be paid to the Indians equally per capita, upon the approval of the agreement; a like sum within a year be used for the benefit of the Indians and their allotments; and the balance of $180,000 be placed in the Treasury, at 4 per cent interest, which should be used for the benefit of the tribes. The sum proposed was about fifty cents per acre for the surplus lands. But the Indians, in view of the fact that the United States proposed to sell the lands thus to be acquired for $1.25 an acre, protested that the Government should pay them that amount, and not try to make money by the transaction, and they therefore asked $715,000 for the surplus lands. To this, however, the Commission would not agree, and the Indians, desiring to terminate a useless discussion, proposed to the Commission that there should be an agreement executed in which all matters determined upon should be fully set down, and that the question of compensation for the surplus lands should be left to Congress. This being agreed upon, such a paper was executed, the fifth article of which reads as follows:

ARTICLE V.

In addition to the allotments above provided for, and the other benefits to be received under the preceding articles, said Wichita and affiliated bands of Indians claim and insist that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments. Therefore it is further agreed that the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Con-

> gress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction of each allotment of land that may be taken in excess of one thousand and sixty (1,060) at that price per acre, if any, that may be allowed by Congress.

But a new element had been injected into the controversy by the action of the Choctaws and Chickasaws, who, in 1890, for the first time, put forward the claim involved in this cause—that the cession of 1866 was in trust for the "settlement of friendly Indians," and that the allotment of lands in severalty to these Indians and the sale of the surplus to white men, would determine the trust and entitle the Choctaws and Chickasaws to compensation for such surplus land so fast as taken up. This claim was presented by a bill introduced March 31, 1890 (H. R. No. 12, 106, 51st Cong., 1st Sess.), fortified by memorials from the two nations. (S. Mis. Doc. 107, 51st Cong., 1st Sess., and H. R. Rep. 3147, 51st Cong., 1st Sess., p 16.) Congress recognized this contention in 1891, by appropriating $2,991,450 to the Choctaws and Chickasaws for this alleged interest in the Cheyenne and Arapahoe reservation, at the same time providing for the latter tribes all that their agreement called for. (26 Stat., 1025.)

This same claim applied to the Wichita reservation, and was urged when the agreement made with the Wichita and affiliated bands of Indians came before Congress. This was presented to the Fifty-second Congress, which took no action thereupon, and it laid over until the third session of the Fifty-third Congress. Then the agreement was approved without determining the amount of compensation to be paid for the surplus lands. On the other hand the act provided as follows:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

The act also provided that the compensation for all Indian claims to this land should not exceed $1.25 per acre.

In this way the agreement made between the Cherokee Commission and the Wichita and affiliated bands of Indians, that Congress should determine whether these Indians should receive more than 50 cents per acre for their surplus lands, and if more, how much, was perverted and made the foundation of a suit to determine matters in controversy between the United States and the Choctaw and Chickasaw nations, in which the Wichitas had no concern, and the determination of which adversely to the United States would, wrongfully and inequitably, be a determination adversely to the Wichitas.

The cause having been fully heard by the Court of Claims, that tribunal found in favor of the retention of the allotments by the Wichitas, but held that they had no interest in the surplus lands and were not entitled to compensation therefor, and further, that the cession of 1866 was burdened with a trust for the settlement of Indians, and when said trust should cease by the sale of any of such

lands, that then the Choctaws and Chickasaws should be entitled to receive from the United States the proceeds of such sale. (Rec., 442-3.)

From this decree of the court below all parties have appealed to this court, the United States and the Wichita and affiliated bands of Indians, generally, and the Choctaw and Chickasaw nations from so much thereof as allowed the retention of the allotments by the Wichitas.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In holding that the Wichita and affiliated bands of Indians are not entitled to all the rights incident to the usual Indian title by occupancy in the lands at issue in this cause, and known as the "Wichita Reservation."

2. In holding that the Wichita and affiliated bands of Indians are not entitled to payment for the surplus lands of the Wichita Reservation after allotments have been made to the individual Indians.

3. In holding that the lands at issue in this cause are held by the United States subject to a trust for the settlement of Indians thereon.

4. In holding that the Choctaw and Chickasaw nations are the owners of the remainder in said lands after satisfying the provisions in favor of the Wichita and affiliated bands of Indians imposed by said trust.

BRIEF OF ARGUMENT.

We will consider the assignments of error in their order.

I.

THE COURT BELOW ERRED IN HOLDING THAT THE WICHITA AND AFFILIATED BANDS OF INDIANS ARE NOT ENTITLED TO ALL THE RIGHTS INCIDENT TO THE USUAL INDIAN TITLE BY OCCUPANCY IN THE LANDS AT ISSUE IN THIS CAUSE, AND KNOWN AS THE WICHITA RESERVATION.

In discussing this assignment of error we shall discuss, first, the rights of the Wichita Indians; second, the rights of the affiliated bands; and third, their joint rights.

a. *The Wichita Indians have occupant title to the lands at issue herein as the possessors thereof before white discovery.*

The lower Mississippi was first explored by the French priest, Marquette, who, in 1674, descended as far as the mouth of the Arkansas, and learned from the Quapaw Indians, living there, that it flowed into the Gulf of Mexico. Two years later than this La Salle returned from Canada to France to obtain royal assent and financial aid for extending these discoveries and bringing them under French sovereignty. With him returned to Canada Henry de Tonti. After several unsuccessful efforts the two, with a party, succeeded in reaching the mouth of the Mississippi in 1682. La Salle went again to France, leaving Tonti in the Illinois country, and returned with a fleet in an endeavor to find the mouth of the river from the sea, an effort in which he was unsuccessful, and which ultimately cost him his life. In 1686 Tonti, having no news of La Salle, descended to the mouth of the river in an effort to find him, in which he failed. On his return he established "Arkansas Post," among the Quapaws, on the Arkansas, a short distance above its mouth. In a work attributed to him, but

the authorship of which he denied,* and which was published in 1697 in Paris, is the first mention of the Wichita Indians. It is printed at page 94 of the record, and relates that Tonti had been requested by the Taensas to go to Natchitoches to settle some tribal disputes, and among the Indians seen there were some chiefs of the "Ouasita" tribe, "who make one people," with the Natchitoches and the Capiches. The work does not say where they lived or how numerous they were. French's Historical Collections of Louisiana (Part 1, page 72), places this date at 1690. (Rec., p. 102.)

During the next few years after Tonti's alleged visit to the Natchitoches, the French built new posts on the Mississippi and Red rivers, and in 1700 Bienville went on a voyage of inspection up the Mississippi as far as the Taensa Indians, living in the present parish of this name in Louisiana. Thence he struck across the intervening swampy country to Natchitoches. The first day out he met the Ouachita tribe of Indians in several canoes loaded with salt. They were on their way to the Taensa village, having abandoned their own on the Ouachita or Black River. At this latter village Bienville found but five cabins and seventy men. (Rec., p. 147.) The Taensa Indians subsequently sought refuge among the Mobiles. We do not

*"Our Illinois live in a very agreeable country. It is, however, not so enchanting as it is represented to us by the author of the new relation on Southern America, which has appeared under the name of M. le Chavalier de Tonti. I have heard M. de Tonti himself say that he disavowed this work, and that he only knew that his name was at its head."

Letter of Father Gabriel de Marèst, from Cascaskias, Nov. 9, 1712; Lettres Edifiantes, Lyons, 1819, Vol. 4, p. 196 (198).

It may be added that the portion ascribed to Tonti, of the "Rélation de la Louisiane," Amsterdam, 1720, is a reprint of the work of 1697 (Denieres decouvèrtes de la Salle dans l'Amérique septentrionale) and is equally spurious.

know what became of the Ouachita immigrants. In 1758, Du Pratz stated that the Ouachitas had been in great part destroyed by the Chickasaws, and that the remnant had retired among the Cadodaquioux. (Rec., p. 98.) Jeffreys, in 1761, reports the same story. (Ibid.) The term "Cadodaquioux" was generic, and includes the Caddos, Natchitoches, and others of the same blood and tongue. But neither Du Pratz nor Jeffreys gives the date of this migration, and it is quite possible that it was concurrent with or immediately subsequent to the movement of 1700. In any event the addition to the Caddos and Natchitoches seems to have been of slight importance, because La Harpe, who was among them in 1719, makes no mention of the Ouachitas in this neighborhood, which he would have done, as he met others farther north, as will be hereafter related. We may safely conclude, therefore, that their near kinship enabled them to become absorbed among the tribes to whom they came.

Continuing the policy of throwing out posts upon the frontier, and especially towards New Spain, in 1719 Bernard de la Harpe established himself near the Caddos at a point on Red River by the present western boundary of Arkansas. He made urgent inquiries among the Caddos about the Indian nations living to the northwest, through whom he wished to reach the Paducahs, amongst whom, it was reported, the Spaniards found great wealth. The Caddos informed him that one hundred leagues to the northwest were powerful nations living on the banks of a great river, but that these countries were unknown to them. (Rec., p. 149.) He sent his colleague, Du Rivage, up the Red River to see what information he could get of these nations, and on his return the latter informed him that seventy leagues away he encountered some nomadic Indians who stated that they knew the "nations situated

towards the north on the banks of a great river" and that they were their allies and that "the principal of these nations was called the Touacara." (Rec., p. 151.) From these nomadic nations, therefore, and not from the Caddos, La Harpe procured his guides, strong evidence that the Touacaras, and the Ouisitas, whom he found with them, were not the same as the Ouachitas who fled for refuge among the Natchitoches or Cadodaquioux, as related by Du Pratz and Jeffreys.

Proceeding several days' journey towards the northwest he came to a large branch of the Arkansas, on the banks of which was the "Touacara" village, extending a league along the river, not far above its mouth. This branch of the Arkansas may have been the Canadian, but other indications point to the Cimarron—though the distinction is unimportant here. The Indians met with were theTouacaras (Towakonie), Toayas and Ouistas (Wichita), Cannouches (Nacaniche), Ardeco (Anadarko), Ascanis (?) Quatoquon (?), Quirasquiris (Wichita), and Houechas (Wacos), practically all Wichitas or close affiliates in blood or language. There were about four thousand resident Indians present and three thousand visitors, among them the Ascanis and Ouisitas, who lived farther to the north. (Rec., p. 156.) Beaurain thinks them the "Mento." (Ib. note.)

To explain their presence in this section of the country we must revert to Pawnee tradition, which asserts that all the Pawnee tribes came from Red River and emigrated north; that the Wichitas started with them, but became dissatisfied and returned. (Rec., p. 219.) The Wichitas also have a tradition that they came from the north before they had horses (Ib., p. 221), and we know of these among the

Pawnees as early as 1682,* and La Harpe tells us that the Indians he met in 1719 were well mounted. (Rec., p. 155.) However unsatisfactory Indian tradition may be, it may here tend to clarify an unimportant matter. Suffice it to say, however, that these Indians were clearly in the course of a general movement from north to south, and not Louisiana and Texas Indians "summering on the Canadian" as counsel for the United States contended in the court below. All of La Harpe's narrative refutes this.

Twenty-three years later (1742), Fabry de la Bruyiere ascended the Arkansas and Canadian to ninety-six degrees west longitude, where he wintered. He reports the remains of a Mento (Wichita) village on the Canadian, abandoned five years before (1737); that before residing there they had lived further up on the Arkansas (Quaere:) where La Harpe found them on the Cimarron, in 1719); but that now (1742) they had moved towards the Caddos. He wasted much time looking for the Mentos, to purchase horses, but failed to find them. From his camp on the Canadian, in longitude ninety-six degrees,† he crossed

*In the original of the extract from La Salle, on page 93 of the Record, the following also appears, being written at the fort of the Illinois, and 200 leagues, therefore falling in the present Nebraska: "They are neighbors and allies of the Gattacka and Manrhoat, who are south of their villages, and who sell them horses which they apparently steal from the Spaniards of New Mexico."

†See Pike's map with correction for error in longitude. This correction is reached by noting that Pike places the mouths of the Arkansaw and Canadian 5¼ degrees of longitude apart instead of the true difference, 4 degrees, while he accurately shows the distance by miles. This shows his meridians too near each other as 4 is to 5¼. He places Fabry's camp at 21¼ degrees (98¼ degrees). Applying this correction, we find the camp at 96 degrees. Further, Fabry did not go far enough west to find the Canadian flowing from the northwest, which it does west of 96½ degrees.

directly to the Red River, twenty leagues distance, and three days above the village of the "Tavakava" and "Kitsaiche," who may, as has been suggested, have been the "Touacara" and "Kichai," though this is improbable, as Fabry visited these villages and in no way connects them with the "Mentos" whom he sought so diligently.

However, in 1759, we find the Wichitas installed in a village on Red River west of longitude ninety-seven degrees, which Mesieres afterwards named San Teodoro. To this point Colonel Parilla was sent by the Spanish authorities, in 1759, to chastise the Northern Indians for an attack made the previous year upon the mission of San Saba. "They advanced against the towns of the Tavoayases, and the region of what was later called San Teodoro," found a force of six thousand Indians of various tribes, who put the Spanish to flight. (Rec., p. 203.)

Between 1759 and 1778, Padre Calahora was sent to these villages and made peace with the inhabitants.*

In 1788, Col. Mesieres marched with an expedition to these Indians to give them assurances of Spanish good will and induce them to move nearer the Spanish settlements. From the Brazos River to the towns of the "Taovaises" on the Red River this expedition passed in sight and to the west of the Cross Timbers (Rec., p. 208), a landmark the position of which in Texas, is well defined, and the western edge of which lies between the 97th and 98th meridians, as shown on the map at the end of this brief. He found the Wichitas living in two villages on Red River, one of 123 houses on the south side and one of 37 houses on the north side. (Ibid.) This residence was the same as that of 1759, because Mesieres demanded and obtained from the inhabitants thereof a brass cannon which they had cap-

* "Doccumentos para la historia ecclesiastica y civil de la Provincia de Texas," 2 vols. MSS. Lib. Cong., Vol. 1, p. 33.

tured from Parilla (Ibid., p. 221), and he named the two villages San Teodoro and San Bernado (Ibid., p. 210), the former, it will be remembered, being the place designated as that near which Parilla's fight took place.

We shall therefore contend that from at least as far back as 1759 the Wichita Indians have resided in the Great Prairie west of the Cross Timbers. For many years they lived in these villages on Red River, which became landmarks of a fixed nature, whose exact location it was not necessary to designate in report or narrative. Later they moved north and west to other villages which were each occupied for a series of years, near which they cultivated their annual crops and to which they returned after each annual hunting trip. As evidence of this we cite the following references:

In the diary of the journey of F. X. Fragoso, from Santa Fé to Natchitoches, under date of July 20, 1788, while he was on the Red River, is the entry "reached the Taguayachi villages." Here he remained six days. These villages were just west of Cross Timbers.*

In 1805, Dr. Sibley was deputed to make a report on Red River and its inhabitants. He informs us that the Wichitas lived in two towns on the south bank of Red River about thirty miles by land and sixty miles by the river above the mouth of the False Washita. He also says they were 800 miles above Natchitoches by river and 340 by land.† (Ib., p. 723.)

Brackenbridge practically reproduces the latter account given by Sibley. (Rec., p. 125.)

In 1807, a work on Louisiana appeared in Paris, under the authorship of one Robin, who was in the province in

*Report of Texas Boundary Commission, H. R. Ex. Doc. No. 21, 50th Cong., 1st sess., p. 49.

†Am. St. Pap. Indian Aff., Vol. I, p. 729.

1803, and his information is therefore concurrent with that of Sibley. He derived it from Dublanc, the French governor of Natchitoches, who seems to have gathered much from Vial, the companion, in 1788, of Fragoso. He (Robin) places the Wichita villages on each bank of Red River, 129 leagues above Natchitoches; as shown at longitude 101 degrees west from Paris on his map at page 109 of the Record.

In 1806, Captain Sparkes started up Red River hoping to go in boats as far as "the country of the Pawnee Piquas," but was turned back by the Spaniards.*

Long, who in 1820, made an expedition in which he intended to come down the Red River from its sources, constantly informed the Indians whom he met that he desired to descend the river "on which the Pawnee Piquas had their permanent residence."†

These are the last references we find to the dual village on Red River west of the Cross Timbers. Major Long, in his map published by Carea and Lea,‡ in 1823, indicates a village of Pawnee Indians, deserted in 1810, at the mouth of the Bluewater River, which is east of the False Washita, at which point we have no historical evidence of any village existing. Melish's map of 1818 shows a Wichita village south of Red River below the mouth of the Blue, but Melish got his information from Darby,§ who, while on pages 28-9 of his work on Louisiana¶ gives the Wichita villages

*Long's "Pittsburg to the Rocky Mountains," London, 1823, Vol. III, p. 166.

†Ibid., p. 29.

‡Reproduced in Record, Greer County Case, Vol. III.

§A geographical description of the United States, etc., John Melish, Phila., 1818, p. 10.

¶Geographical description of the State of Louisiana, Wm. Darby, Phila., 1816.

east of the Blue, on page 51, says the Washita flows into the Red seventy miles above the Blue and a short distance below the Wichita towns.

In a report, made in 1835 (Rec., page 173), to the Commissioner of Indian Affairs, Major Armstrong said that a trading post had been established "at the old Pawnee village on the Red River, about twenty miles above the Cross Timbers, and 100 miles below the Pawnee village visited by Colonel Dodge. The trading house established is about seventy-five miles on a direct line above the mouth of the False Washitam." This would be just east of the 98th meridian, is the most accurate placing of record, and corresponds with the narratives of Mesieres and Fragoso, who are the only two writers who went to these villages and the only two who mention them in connection with the Cross Timbers, a landmark of great importance which Sibley entirely ignores, although probably accurate in his description of the river up to this point.

Sibley's information about upper Red River was derived from Grappe, who claimed knowledge to the Pawnee towns, but says that the country is all prairie except a fringe of woods along the river, thus ignoring the Cross Timbers, which no actual visitor could have done. Dr. Sibley himself never went up the river much above Natchitoches.

It must be remembered that the site of these villages was Spanish territory until 1819, and that the Spaniards were very jealous of encroachments by either the French or Americans, and that exploration was therefore rare. The land was penetrated only by hunters, who have left us no record of their travels; thus what records we have are none too distinct up to the time we have covered.

Admitting, then, that Long's date (1810) is correct as to the desertion of the Red River villages, though his lo-

cation of them is erroneous, we shall attempt to follow the Wichita Indians in their further movements.

A statement, in 1882, of Uts-tuts-kins, a member of the tribe, is to the effect that he was born on Red River, near the mouth of the Little Wichita, and that, when he was a child, the villages on Red River were deserted for one at the mouth of Cache Creek. That while living at the latter place they had smallpox and lost more than half their people.*

That the prairie tribes were visited by this scourge in 1816 we know from the report of Jedidiah Morse, to the Secretary of War, on Indian Affairs, in 1822 (App., p. 259). Uts-tuts-kins tells us further that from the mouth of Cache Creek the tribe moved to the mouth of Otter Creek, where they were visited by soldiers.† This was Dodge's expedition of 1834, which found them somewhat north of Otter Creek and opposite the mouth of Elm Fork, under the western spur of the Wichita mountains, known as "Mount Webster."

In 1832, Albert Pike and a party crossed the Llano Estacado from Taos, New Mexico, and traversed the country southeast of the Wichita Mountains on their way to Fort Smith. They "expected to find a tribe of Indians known to the old hunters and trappers as Pawnee Piks, whom one of our party of five knew and talked much about, living, he and others said, in the vicinity of mountains north of Red River, in a village or villages, and cultivating the soil."‡

In 1830, when the Choctaw treaty was before the Senate, A. P. Choteau, a well-known Indian trader, gave in-

*Senate Executive Document, No. 13, 48th Cong., 1st Sess., p. 36.

†Document 13, supra, p. 36.

‡Document 13, supra, p. 29.

formation in response to an inquiry, that the band of Indians nearest to the Choctaw country was the Pawnis Pick, whose village was about 250 miles from Fort Gibson. (Rec., page 328.) From this latter post in an air line to the Pawnee Pick (or Wichita) village by Mount Webster, visited by Dodge in 1834, the distance is 235 miles.

It has been argued in the court below that the village referred to by Choteau was in Texas, but this is improbable, as in 1834 Texas was a part of Mexico, and Dodge, starting with a military expedition from Fort Gibson for the Pawnee Pick village, certainly did not intend to invade foreign territory.

In the annual report of the Secretary of War for 1834, (pp. 33-4), we are told that because of depredations by prairie tribes, particularly the Comanches and Kiowas, this military expedition (at first under General Leavenworth), was sent to make a display of force to impress the savages with the power of the United States and their own relative weakness. The illness of the commanding general en route devolved the command on Colonel Dodge. The artist Catlin and a young trader named Chadwick, accompanied the expedition. We have two naratives of it, one from the pen of Lieutenant Wheelock, the military recorder, and one in Catlin's own book.*

Dodge found the village of the Pawnee Picks or Toyash "situated immediately under mountains of granite, some 600 feet in height. In front of the village runs the river."† Catlin says that this Pawnee village lay on the bank of Red River (i. e., the North Fork thereof), en-

*Report of the Secretary of War, 1834, p. 70 et seq.; Catlin's "Manners, customs and condition of the North American Indians," New York, 1844, Vol. II, p. 70 et seq., reprinted in Record, pages 214 et seq.

†Report supra, p. 79.

closed by a stupendous range of mountains of reddish granite. Catlin illustrates the village (all of the drawings in this work being from the original oil paintings in the Catlin collection in the National Museum), and while he explains that he was not personally present, being left in a sick camp on the road thither, he loaned his sketch book to the trader, Chadwick, who made the original sketch for him. Captain Scott, in a deposition in this cause (Rec., p. 194), says that this is a picture of the old Wichita village, "at the base of the Wichita Mountains, in what is known as 'Devil's Canyon.'" It is reproduced in the record at page 216, and in this brief at page 27.

The remains of the Devil's Canyon village were unearthed by the Texas Geological survey some years ago, as evidenced by the deposition of W. F. Cummins in the Greer County case in this court, a map attached to which shows that it was on the North Fork of Red River just below and opposite the mouth of Elm Fork. (Rec., U. S. vs. Texas, map following p. 984 and of this record, p. 238.)

Catlin's map attached to his work and republished in the volume on "Indians" (p. 45) of the census of 1880, shows a Wichita village and a Waco village on either side of Red River.

The report of the Texas Boundary Commission* gives a statement of Shot Arm, a Waco chief and an old man in 1858, who said that he was born at a village on North Fork at the foot of Mount Webster. This would indicate a long residence of the Wacos on the south side of the North Fork of Red River at this point.

An intelligent Wichita Indian told Dodge that their old men were born farther south,† which would agree with the

*House Executive Document No. 21, 50th Cong., 1st Sess., pp. 64 to 67.

†Report Sec. War, 1834, p. 87.

statement of Uts-tuts-kins, who, in 1834, was a young man, that the tribe had moved from the Red River village during the lifetime of their then older men.

As hereinafter mentioned, Colonel Dodge took back with him to Fort Gibson delegates of the Pawnee Picks (Wichitas), as well as the Comanches and Kiowas, and they there made arrangements for the treaty executed the following year, which we shall discuss later.

It was evidently fear of the Osages that drove the Wichitas to their stronghold at the western end of the mountains, for when this fear was relieved by the assurances of the Osages, who accompanied Dodge, and also those received at Fort Gibson, they moved farther east, near Mount Scott, where Fort Sill now is. Mr. Mooney testified in the Greer County case that he had been told by old Indians that this movement took place in 1834, "the year after the stars fell." (Rec., p. 137.)

They continued to reside at Mount Scott until 1850. Niastor, a Wichita Indian, was born there in 1837. (Rec. 221.) General Bee, of the Texas forces, visited them there in 1843 (Rec., p. 234); and Marcy, in 1852 found the remains of their villages at this spot, and was told they had been deserted two years before.*

From the Mount Scott (Fort Sill) village they removed "because it was so situated as to be easily approached under cover by their enemies"†—the roving tribes—"and because it was at times surrounded by deep water and often overflowed." This caused excessive malaria, which decimated the tribe.‡ They went to a point just west of Cross Timbers at Rush Springs, and here Marcy found them in

*Explorations of the Red River of Louisiana, in 1852, Randolph B. Marcy, U. S. A., p. 72.

†Albert Pike, in Document 13, supra, p. 29.

‡Rector, in Document 13, supra, p. 20.

1852,* and here they remained until 1858, when an incursion of the Comanches drove them to the protection of Fort Arbuckle, a short distance to the east.† They remained there till the following year, when they were taken in hand by the Government, joined by the Caddos and others of the affiliated bands, and placed around the agency constructed on the Washita River within the limits of the reservation at issue in this cause.

It will be well, at this point, to examine the habits of the Wichitas from our first knowledge of them to the present day. These habits are shown to be non-nomadic by their permanent habitations and their devotion to agriculture.

La Harpe (1719) says of the village on the Cimarron thus (Rec., pp. 155 and 158):

> These villages make but one, the houses being joined to each other running from east to west, for a league, in the most beautiful situation that one could see. * * *
>
> These peoples quit their village in the month of October to go on their hunt, whence they only return in the month of March to sow their corn, beans, and pumpkins, upon which they feed in the summer. * *
>
> The savages here cultivate a prodigious quantity of tobacco, which they press into small cakes after having powdered it. * * *
>
> Their cabins are raised, the greater part built of straw and reeds, coated with earth, forming a dome; above the door each chief of the nation has his arms painted on a piece of round leather; they represent the sun, the moon, and the stars, and different animals.

Mesieres (1778) tells us of the dual village on Red River near the Cross Timbers (Rec., p. 208):

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*Exploration of Red River, p. 77.

†Indian Report, 1859, pp. 216-7.

> The Taovaise Nation is divided into two villages, one situated north of the "Rio Bermejo" or of Natchitoches, and the other opposite. The former village is composed of thirty-seven houses, and the latter of 123 houses. Every house contains from ten to twelve beds, from which it is computed that the number of men, including the youths, reaches beyond 800. The number of women and children of both sexes is very large.
>
> Their foresight in supplying themselves with food is creditable to their industry. There is no house where there are not four or five bulls and vessels full of corn, containing ordinarily four and and a half "fanangas," with a great quantity of beans and pumpkins, the latter being kept one year to be curiously adorned, like mats. They raise also melons and tobacco in abundance.

Sibley, in 1803, reports (Am. State Pap. Ind. Aff., Vol. I, p. 723):

> They have many horses and mules. They raise more corn, pumpkins, beans, and tobacco than they want for their own consumption; the surplus they exchange with the Hietans for buffalo rugs, horses, and mules; the pumpkins they cut round in their threads, and when it is in a state of dryness that it is so tough it will not break, but bend, they plait and work it into large mats, in which state they sell it to the Hietans, who, as they travel, cut off and eat it as they want it. Their tobacco they manufacture and cut as fine as tea, which is put into leather bags of a certain size, and is likewise an article of trade.

Of the village on the North Fork (1834), Dodge's historian says (Report of Sec'y of War, 1834, p. 78):

> Passed their cornfields on our way to the town; these fields are well cultivated, neatly enclosed and

very extensive, reaching, in some instances, several miles; we saw also here melons of different kinds, squashes, &c.

We counted near 200 grass lodges; these are made of poles fixed firmly in the earth, fastened together at the top, and thatched substantially with prairie grass and stalks from their cornfields; many of these lodges are thirty feet high and forty feet in diameter; in the center of the floor a shallow excavation serves as a fireplace; around the sides are comfortable berths large enough to accommodate two persons each.

From conversation with one of the Indians we learn * * * that Comanches exchange buffalo meat for agricultural products of the Toyash.

(P. 87.)

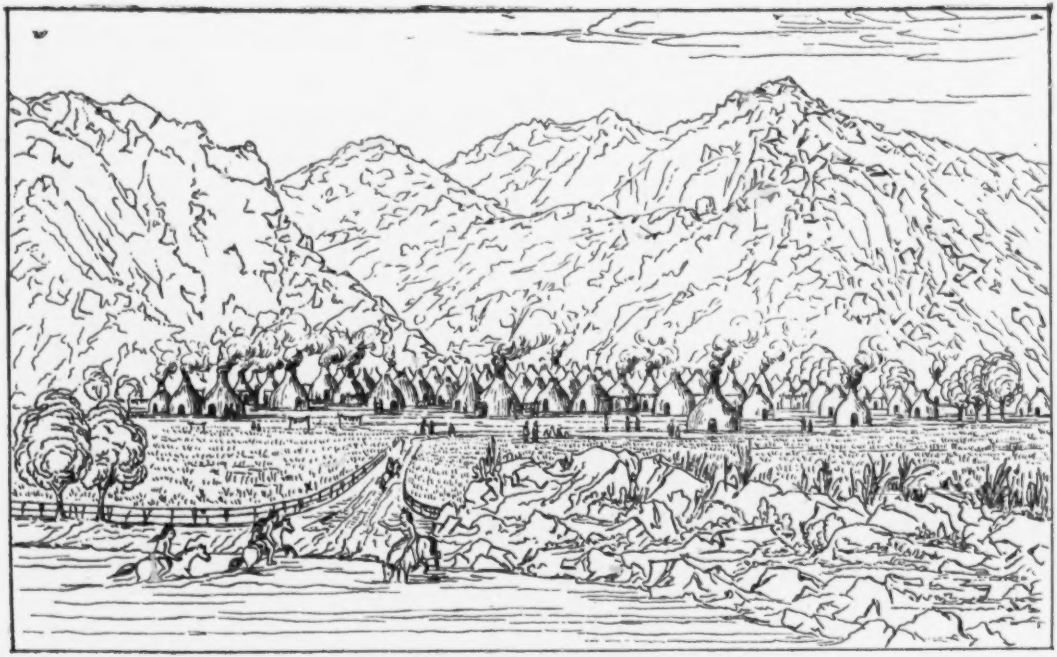
Of the same village Catlin (1834) says (Rec., p. 214):

We found here a very numerous village, containing some five or six hundred wigwams, all made of long prairie grass, thatched over poles which are fastened in the ground and bent in at the top; giving to them, in distance, the appearance of straw beehives, as in plate 173 (see opposite page), which is an accurate view of it, showing the Red River in the front and the "mountains of rock" behind it.

To our very great surprise we found these people cultivating extensive fields of corn (maize), pumpkins, melons, beans, and squashes; so with these aids, and an abundant supply of buffalo meat, they may be said to be living very well.

Marcy (1852) thus speaks of the village on Rush Creek (Marcy's "Exploration of the Red River of Louisiana," p. 77):

There are two villages here occupied by the Wichitas and Wacos, respectively; they are situated in the rich and fertile valley of the creek, where



WICHITA VILLAGE, 1834, AFTER CATLIN.

they have cultivated corn, pumpkins, beans, peas, and melons. * * *

The village of the Wichitas has forty-two lodges, each containing two families of about ten persons. These lodges are arranged by erecting a framework of poles placed in a circle on the ground, with the tops united in an oval form, and bound together with numerous withes or wattles, the whole nicely thatched with grass, and when completed it makes a very commodious and comfortable domicile. The interior arrangements are such that every person has a bunk, raised from the ground and covered with buffalo hides, forming a couch which is far from being uncomfortable. When seated around their fires in the center of the lodges, they have an air of domestic happiness about them which I did not expect to find.

The lodges are about twenty-five feet in diameter at the base, twenty feet high, and in the distance have very much the appearance of a group of haystacks. With the exception of a few families that live on the Canadian, the whole Wichita nation is concentrated at this place; their numbers do not exceed five hundred souls.

The following appears in the report of the Commissioner of Indian Affairs for 1869:

(P. 85.)—About 3 o'clock we left the agency grounds and rode over to the Wichita village, about three miles northeast up the Eureka Valley. What a strange spectacle met the eye—"A level plain, dotted with huge haystacks," exclaimed friend R—. But how symmetrical and beautiful—thirty to forty feet high, and as regularly built as though they were laid out by rules of geometry.

As we neared them we soon discovered that our haystacks were the houses of the Wichitas, built of straw, thatched, layer upon layer, with stout bindings of willow saplings, tied together with buffalo

hides or stripped hickory. Out of the top the smoke issued, and around an oval opening, or door, at the side a crowd of naked men and women hovered in questioning solicitude at our coming.

On one side of the door a porch is erected, running along some twenty feet or more, with coverings of small branches for shade, and a raised floor of hickory poles, two feet from the ground, for a summer afternoon's siesta.

The men are good-natured and the women cheerful, though more naked than any we had seen. Their dwellings are commodious, clean, and comfortable. In the center is the fire, small and economical, as the Indian always makes it. Around the sides the beds are fitted up on bunks raised three feet from the floor, built of split boards tied together with cords made from buffalo hide. The floor is hard packed earth, clean as it well can be. The builders have wisely and unconsciously made the best of their circumstances. The grass, willow saplings, buffalo hides, etc., are all found close at hand; and out of these, which would have been to us impracticable materials for house building, the Wichitas have constructed most convenient habitations.

Watermelon patches, with neat fences, are near at hand. The fields show marks of earnest cultivation, and the people, though evidently very, very poor, are yet glad hearted and hopeful. (Report of Special Commissioner Colyer.)

(Ib., p. 383.) These Indians have, from time immemorial, been accustomed to raising small lots of corn. They still continue it, and this year have many of them on the banks of the Wichita River, which they have planted and cultivated without any assistance from the whites. * * * The Wichitas, Caddos, and affiliated bands claim to be the prior occupants of this district of country, and that they have never ceded it to the United States or received any compensation therefor; and there is nothing in this office to show that there has been

> any part of the country reserved to them. They are, however, occupying both sides of the Wichita (or Washita) River. I would urge the attention of Congress to the claim of the Wichita Indians. (Report of Agent.)

Indians of the habits of the Wichitas, as here shown, are certainly as sedentary as any of the tribes known to the whites. Their villages were, as we have seen, so constructed as to make it impracticable, nay, almost impossible, to permit of their frequent change. The tribe removed but short distances at each abandonment of a residence. Considering them in 1719 at the mouth of the Cimarron, they moved some seventy miles to the Canadian, which they left in 1738. Then as much farther to the Red River, and again about one hundred miles to the mouth of the Little Wichita, or thereabouts. Here they remained for over fifty years. Thence to Cache Creek was but thirty to forty miles; seventy more to Mount Webster; fifty back to Mount Scott, and finally thirty miles to Rush Springs. Within a circle having a radius of fifty-five miles they resided for a century.

We are in the habit of considering the Cherokees as a sedentary race, but even that tribe changed its villages from time to time, using them as centers of habitation around which they cultivated their crops, and from which they moved as the exigencies of tillage or tribal defense required. The Wichitas were as non-nomadic as they, and they are entitled to the same occupant rights, acquired in the same manner.

We claim, as we have said, that the Wichitas have such rights through being "occupants by virtue of a discovery made before the memory of man," as this court said of the Cherokees in Worcester vs. Georgia; and these rights entitled them to the whole of "the Great Prairie west of the

Cross Timbers, to the western limits of the United States," in the language of the treaty of 1835. (7 Stat., 474.) These western limits were then at the 100th meridian, and the Cross Timbers lay just to the east of the 98th.

We have three records of the size of these villages in the Great Prairie, as stated above. In 1778 (Mesieres) they contained eight hundred men and youths, and a large number of women and children, living in 160 wigwams, or grass houses. (Rec., 208.) Smallpox intervened at Cache Creek.* In 1834 (Dodge) there were two hundred lodges.† Malaria, at Mount Scott, attacked them fiercely.‡ In 1852 (Marcy) there were but 42 lodges, containing 500 persons.§ It was a small tribe, but compact, keeping together in one town.

Its paucity of numbers does not preclude its having property rights. If the whole leased district were accorded to the Wichita and affiliated bands of Indians, now numbering about one thousand, each would have 7,800 acres, preposterous, if you will, from the white man's view; but General Clark, in making the treaty of 1818 with the Quapaws, thought he was getting 30,000,000 acres (Am. St. Pap. Ind. Af., Vol. 2, p. 179), which was nearly 30,000 acres for each of the 1060 members of that tribe. (Rec., p. 159.) Why should not the Wichitas have acquired as great territorial rights as the Quapaws, of equal numbers?

As already stated, Colonel Dodge, from his visit to the North Fork of Red River, in the summer of 1834, returned to Fort Gibson, accompanied by delegates of the Comanche, Kiowa, and Wichita tribes. Here they were met by members of the emigrant tribes, the Choctaws and others, and,

*Executive Document 13, p. 36.

†Rep. 1834, supra, p. 79.

‡Executive Document 13, p. 20.

§Explorations of Red River, p. 77.

with representatives of the United States, held council "where, for several days in succession, free vent was given to the feelings of men civilized, half civilized, and wild; where the three stages of men were freely asserting their rights, their happiness, and friendship for each other. The vain orations of the half-polished (and half-breed) Cherokees and Choctaws, with all their finery and art, found their match in the brief and jarring gutterals of the wild and naked man."*

Unfortunately we have no record of the proceedings of this council, or of that which took place at Camp Holmes in the following summer (August, 1835). This camp was on the site of the subsequently located "Choteau's Trading House," on the north bank of the Candian, near the present town of Purcell, just west of Cross Timbers.

The direct result of the last named council, and the indirect result of the first, was the treaty to be found in the Seventh Statutes at Large, at page 474. It is between the United States and the Comanche and Wichita nations, and their associated bands or tribes (as stated in the title, although no associates executed the document) and between these nations and the Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations. It is as follows:

> Article 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.
>
> Article 2. Every injury or act of hostility by

*Catlin's "Manners and Customs," supra, Vol. II, p. 82; Record, p. 215.

one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either the Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may have been stolen from them; *Provided*, that the property so stolen can not be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of

trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that, in the event of any of the red people belonging to the nations or tribes residing south of the Missouri River and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found on their hunting grounds, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the Government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8. It is agreed by the Commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first that they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the Government of the United States desire that perfect peace shall

exist between the nations or tribes named in this article, the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the Government thereof.

First, therefore, the treaty prescribes peace between all the parties and forgiveness for past offenses. It provides (Art. 3) that citizens of the United States shall have free passage through "the settlements and hunting grounds" of the Comanches and Wichitas *on their way to the Republic of Mexico.* It therefore declares, beyond reasonable dispute, that these settlements and hunting grounds were *on the way* to Mexico and not *in* that republic, but within the limits of the United States, which did not then include Texas.

It further provides (Art. 4), that all the Indian signatories should "have free permission to hunt and trap in the Great Prairie west of the Cross Timber to the western limits of the United States." It was in this prairie that Dodge, in 1834, found the Wichita village, and bands of hunting Comanches and Kiowas, and in this prairie, though contained in the cession to the Choctaws, the latter had made no settlements. It was in this prairie, too, that the Wichitas had one of their villages in 1778, when visited by Mesierres; here also that General Bee visited their village in 1843, the remains of which Marcy found, in 1852; and in the same prairie that Marcy found their new village in the latter year. The grantors under this fourth article of the treaty were, therefore, the Comanches and Wichitas, and they gave permission to the eastern Indians to hunt in their domain. It does not appear on the record, nor have we been able to find evidence of the fact (if it be one) that the Comanches and Wichitas were told or had knowledge of the extent of the Choctaw cession.

Further (Art. 5), the Comanches and Wichitas agreed to pay for injuries to American traders occurring near their settlements or in their hunting grounds; obviously relating to the same "great prairie." It is not to be supposed that the Choctaws and other Eastern tribes were incapable of inflicting such injuries, but still they enter into no such obligation to compensate therefor. The discrimination was obviously made because the Wichitas and Comanches possessed the settlements and hunting grounds and not the Choctaws and others, who were intruders thereupon, if actually there at all.

Again it is the Comanches and Wichitas, and not the Choctaws and others, who agree (Art. 6) to kindly treat other Northern tribes, not parties to the treaty, who may be found on their hunting grounds, that is, the "great prairie." This again because these northern Indians were liable to come in contact with only Comanches and Wichitas in this locality.

And finally (Art. 9), the execution of the treaty was not to injure the friendly relations of the Comanche and Wichita nations with the Republic of Mexico, "where they all frequently hunt and the Comanche nation principally inhabit." Can anything short of positive averments to that effect, in the treaty itself, more conclusively show that the Wichita Indians in 1835 resided within the limits of the United States, although they crossed the frontier on their hunting trips, while the Comanches principally inhabited Mexico, although their hunting grounds extended into the United States.

It is well that we should here discuss the reports of the various agents and officials of the Government, as to the habitat of the Wichita Indians around the Wichita Mountains, and in the Great Prairie north of Red river and west of the Cross Timbers, the greater portion of which has

since become known and is known in this cause as the "Leased District." They are here especially important as fortifying our claim that the treaty of 1835 was a virtual acknowledgment by the United States of the Wichita residence in this region, amounting to a legal occupancy.

Prior to the making of the treaty Colonel Dodge had said to the Indians assembled at the village at Mount Webster:

> You say that the Indians over Red River are your enemies, they kill you when you meet; these are Mexican Indians, and do not make treaties with our Great Father, the President.*

And yet, as a result of this conference, the "Great Father, the President," on behalf of the United States, and acting through Commissioners Stokes and Arbuckle, did, the following year, make the treaty with the Wichita Indians which we have already discussed. Hence they were not Mexican (Texan) Indians.

In forwarding this treaty to the Government these commissioners used, in part, the following language. (Rec., p. 176.):

> As some confusion has existed, both here and elsewhere, with respect to the names of the nations of the Great Western Prairie, who reside or hunt to the west and southwest of this post (Fort Gibson), we deem it proper to inform you that there are but three distinct nations of these Indians, with the exception of one or two small tribes who reside far south of Red River, in the Province of Texas. These three nations are the Comanches, who are the most numerous, but who have no fixed or permanent villages, and follow the herds of buffalo with their movable lodges, and are sometimes north

*Rep. Sec. War, 1834, p. 84.

> and at other times south of Red River. The Wichitas consist of several bands, some residing north and some south of Red River. Those residing north of Red River are the Toweeash and Wachos. They have fixed villages, and raise some corn and vegetables. The Kioways have no fixed villages, but wander from the Cross Timber on the Arkansas, Canadian and Red River, to the Rocky Mountains, and are sometimes, but not often, south of Red River.

After this treaty went into effect some dissatisfaction arose among the wild tribes, parties to it, especially the Comanches, and a special agent was sent in 1837 to confer with them, and in the instructions given to him the Commissioner of Indian Affairs referred to the treaty as made between "indigenous and emigrant Indians and the United States." The former were the Wichitas and Comanches, and the latter the Choctaws and others. The agent was also instructed to be vigilant to detect "the earliest indications of a purpose on their (the indigenous Indians') part to form an alliance with the Indians in Texas and Mexico."*

Evidently the Wichitas were then officially regarded as inhabiting the United States and subject to its jurisdiction at a time years before the annexation of Texas.

It was not, however, seriously contended by our opponents below that the Wichita residence was other than we have described it, just prior to 1836, but the claimants below did contend that about that time the Wichitas removed to Texas, and there remained for fifteen or sixteen years, and thus abandoned the country, and could not thereafter acquire occupant rights.

The court below seems to have been so much impressed with this contention of the claimants that the Wichitas were Texas Indians and had no right of occupancy north

*Report Commissioner of Indian Affairs, 1837, p. 558.

of Red river that we venture to point out what seem to us the fallacies of its reasoning, taking up the opinion at page 371 of the Record.

> Catlin's North American Indians shows the Pawnee Picts and Wacos on the Red River about latitude 35° 10′ N., longitude 103° 15′ W. This would be in the "panhandle" of Texas.

This map is wrong as to longitude. It shows Fort Smith at 96° when it should be at 94½°, while Santa Fé is shown at 107° when it should be at 106°. If these well known points are more than a degree out of longitude, how can we expect a true location of two Indian villages out on the prairie, reached by a circuitous route by the Dodge expedition, of which Catlin was a member. Capt Scott's identification (Rec., p. 194) of Catlin's picture (Ib., p. 216) as being of a village at Devil's Canyon, which is almost in the center of the so-called "Leased District," should dispose of this contention.

The court further says:

> General Bee found a Wichita village on Cache Creek about thirty miles from its mouth. It does not appear how many of the tribe lived upon Cache Creek, nor how long they had lived there. The proofs are numerous that the residence of the Wichitas was in Texas between 1836 and 1850. (Rec., 371.)

From Bee no proof of size or length of residence appears, it is true; but the proof still exists as to the latter. Mooney says (Rec., p. 137) that the Wichitas moved in 1834 from the Devil's Canyon village to that near Fort Sill, the village visited by Bee. Niastor, a Wichita Indian, was born there in 1837. (Rec., p. 222.) Marcy visited the spot in 1852 and said that the village had been deserted two years

before.* So we have absolute evidence of residence at this point in 1834, 1837, 1843, and 1850. This is exactly the period during which the court below finds numerous proofs of residence in Texas. (Rec., 371.) Let us examine them.

First, there are several maps showing a Towiash village at various points, in the years 1836 to 1849. There seems to be no doubt (from these maps) that such a village existed, but we have absolutely no account of it from any actual visitor; nor does its mere existence preclude a residence by a majority of the tribe at Fort Sill.

We again quote from the opinion below:

> A Wichita chief called Ta-wak-onee Jim testified that he was born in 1843 in Texas, and came to Fort Sill when about ten years old, and that the Wichitas used to live at the To-wak-onee Hills in Texas. (Rec., 372.)

It is a well known fact that the Tawakonees, of which Jim is a member, form a clan of Wichita blood, the same as the Touacaras of La Harpe, who lived in Texas at least as far back as 1778, and then on to 1859, when they were brought to the Territory. The conclusion that the Wichitas lived in Texas is here derived from a garbled extract of Jim's statement as found in the record in this cause. It omits the salient clause in the original deposition, which relieves the situation of all doubt, and which will be found in the record in the Greer County case (p. 634), which says: "The Wichitas were at the foot of the hill, Medicine Lodge, about a mile and a half from where Fort Sill is now located."

Speaking of the treaty of 1846 (that of Council Springs) the court below says:

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* "Exploration of Red River," p. 72.

> This treaty was made in Texas with Texas tribes, because of the sovereignty which the United States had acquired over them by annexation. (Rec., 372.)

In 1843 a movement was set on foot by the Indian Department to make a new treaty with the Indians of the "Southwestern Prairies."* Texas was not yet a part of the Union, but an independent republic. Pursuant of this movement, which did not immediately mature, instructions were issued to commissioners, on September 12, 1845, after the annexation, to effect an understanding with the Comanche and other wild tribes of Indians of the southwestern prairies. This was effected the following year by a treaty,† which the court below says was with Texas tribes, although there is no warrant for this conclusion in the treaty itself. In forwarding this treaty through official channels to the Senate, it is variously referred to as follows:

By the treaty commissioners:

> A treaty of peace and friendship made and concluded on the 15th day of May last at Council Springs, State of Texas, on the Brazos River, with the various tribes of Indians inhabiting the western prairies on the borders of Texas, to wit: The Comanches, Ionies, Anadacas, Caddoes, Lepans, Tonkawas, Keechies, Tahwahcarros, Wichitas, and Wacoes.‡

By the Commissioner of Indian Affairs:

> A treaty, etc., with the Comanche and other wild tribes of Indians of Texas and the southwestern prairies.§

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*Confidential Ex. Doc. No. 13, 29th Cong., 1st sess., p. 13.

†9 Stat. L., 844.

‡Confidential Doc. 13, supra, p. 9.

§Ib., p. 8.

By the Secretary of War and the President:

> A treaty, etc., with the Comanche and other tribes and bands of Indians of Texas and the south-western prairies.*

That we may be left in no doubt, however, of the portion inhabited by the Wichitas, the following from the report of the commissioners who negotiated the 1846 treaty, giving the habitat of the various signatories, is important:

> The tribes with whom we were in negotiation at Comanche Peak, and with whom we concluded a treaty at Council Springs on the 16th of May, a copy of which has been sent to the department, are as follows:
>
> * * * * * * * *
>
> The other little bands, viz: Witch-a-taws, Towzash, To-noc-co-nies, Keechies, and Wacoes, are inconsiderable in number and degenerate in character. They do not exceed one hundred and fifty souls each. They plant corn and pumpkins for their own use and raise some for trade. They live in villages, and have temporary huts made of skins and straw.
>
> The Witch-a-taws and Towzash live on the north side of Red River, in the Witchitaw mountains. The other tribes reside upon the Brazos, about one hundred miles above the Comanche Peak. They informed us that they had lost their numbers by smallpox and repeated wars with the Texans. They have the reputation of being the best horse thieves in the prairie.†

The Court of Claims says further in this regard:

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*Ib., p. 7.

†H. R. Doc. No. 76; 29th Cong., 2d sess., pp. 6-7.

> In 1847 a special Indian agent for Texas went to the village of the Wacos, Wichitas, Tah-wah-caroos, and Keechies and compelled the return of stolen horses. This village was situated on the Wichita River, and the six tribes met there were reported as making corn to considerable extent. If this statement be true the main Wichita village was on the Wichita River (i. e., the Big Wichita, where the village is shown on De Cordova's map), while another village was near the Brazos. If the Wichitas lived on Cache Creek, near Mount Scott, at that time, it could only have been but a few families. (Rec., 372.)

It is true that Agent Neighbors does refer to the village on the Big Wichita as the main Wichita village, in 1847, but he undoubtedly meant the main settlement of these Indians in Texas, where they were intruders from north of Red River, and had a temporary residence only, as will appear from contemporaneous reports.

The opinion continues:

> In 1849, the Chickasaw agent reported the Wichitas and other Texas Indians in the western part of the Chickasaw country. Catlett's report of that year stated, however, that they lived upon the Brazos head of the Trinity and upon the Big Wichita. Agent Neighbors, to all intents and purposes, confirms this report, and consequently before they could have lived in the Chickasaw country. (Rec., 373.)

This exerpt affords us an excellent opportunity to point out two things: First, how untrustworthy was the evidence furnished by the claimants, and, second, how it misled the court. Catlett's report has a comma after the word Brazos, in the portion quoted, while it is omitted in the quotation in the claimant's brief below (Chickasaw brief,

p. 91); the court also omits the comma, showing that it did not examine the original, which is to be found in the report of the Indian Commissioner for 1849, at page 30, et seq.; and which, if examined, would prove quite a different fact from that which the claimants' exerpt would indicate. Captain Catlett's report is so important on this question of residence that we print the germain portion quite fully in a note. He had long been in the service as quartermaster on Texas frontier, and that he knew whereof he spoke is evidenced by the report of Commissioner Medill, on page 39 of the same document.*

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*(The small caps are italics in original; the italics are ours).—"I shall confine my statements to those Indians living and hunting south of Red River, and will divide them into two classes, the first comprising those who BELONG PROPERLY TO TEXAS, and the second those who have migrated from tribes residing beyond the limits of Texas, and have intruded themselves upon her soil.

"The several bands of Comanches, the Tonkaways, the Lipans, Wacoes, and Towacanies, and about fifty Karankaways, who live among the Mexican settlements on the Rio Grande, and seventy-five or one hundred Bedies, who live in the settlements around Houston and the lower Trinity, are the only aborigines of the country, and compose the FIRST CLASS.

"The second class are those who have intruded themselves upon the soil of Texas. They are much more formidable, and have done more damage, and given more trouble and alarm, than those PROPERLY BELONGING TO TEXAS. They are the Wichitas, Towash, Kechies, Caddoes, Anna-darkoes, Ionies, *Delawares*, Shawnees, Baluxies, Cooshates, Creeks, Cherokees, Iowanes, Alabamas, Unataguas, Quapaws, Tohookatokies, Seminoles, Osages, Chickasaws, and Choctaws, and occasionally a few Pottawatomies, Ottawas, Pawnees, Mahas, Arapahoes, Cheyennes, and other tribes living in the far northwest. The aggregate number of these tribes in Texas will probably average about 7,000 or 8,000 souls. They are constantly going to and from their own homes, and at times their numbers in Texas will probably amount to 12,000 souls, and is, I believe, hardly ever less than 7,000.

* * * * * *

"I now proceed to show the position, etc., of those people in

The only conclusion to be drawn from this authoritative report is that the Wichitas in Texas were intruders there, constantly going, with other northern Indians, to and from their real homes north of Red River; and further that, in 1849, the Wichita villages had "for years past" been situated in the Wichita Mountains.

The report of the Chickasaw agent,* referred to by the court below, that in 1849 the Wichitas lived in the western part of the Chickasaw District, is, therefore, correct; as that district from 1837 to 1855 extended to the 100th meridian and embraced the Wichita Mountains.†

Further the court below says in its opinion:

Texas. The Wichitas, Towash, and Kechies, numbering in all about six hundred souls, live near together upon the Brazos, head of the Trinity, and upon the Big Wichita (the main southern branch of Red River). They are about 180 miles above the upper white settlements on the last-named river, and about 200 miles above the settlements upon the Brazos. *They are all of the Wichita Tribe, and their proper homes are in the Wichita Mountains, north of Red River, and within the United States Indian Territory.*

* * * * * *

"It may be asked, how those Indians, if once out of the country, are to be kept out. I answer, by the establishment of a military post near Red River, on the south side, at the upper edge of the upper cross timbers, and about 100 miles above Fort Wachita. The post would be near the great crossing on Red River, used by these bands in passing from the south of Red River to their homes, *and to the Wichita and Kiechie villages, situated in the Wichita Mountains, some 80 miles north of Red River.* Those villages have *for years past* been the rendezvous for all the predatory and thieving bands that have so much plundered and disturbed the Texas frontier, to which they resort for the purpose of exchanging and disposing of a portion of their plunder to the Indians living farther to the north and east." (Indian Report, 1849, p. 30 et seq.)

*Indian Report, 1849, p. 191.

†Choctaw-Chickasaw treaty, 1837. (11 Stat., p. 573.)

> On July 19, 1852, Marcy passed the deserted Wichita village on Cache Creek, and three days later he came upon the new Waco and Wichita villages on Rush Creek, built after the removal from Texas reported by the agent in 1851. Marcy was probably ignorant of the fact that the Wichitas, or most of them, had been living in Texas. His report must be taken for what it is worth. His opinion was that their claim to the country around the Wichita Mountains was guaranteed to them by right of occupancy and possession. We attach no value to his opinion. (Rec., p. 373.)

This opinion of the court is expressed with entire disregard of the fact that this was the second report that Marcy had made, the first being in connection with a trip from Santa Fé home through Texas in 1849, the route of which is shown on the map in the record, at page 248.

This report, in part, is as follows:

> The Rio Brazos runs through a country much frequented by all Southern prairie tribes of Indians east of the Pecos. Upon the south and west side range that numerous and powerful tribe, the Comanches; also the Kioways, Lepans, and Tonkeways. Upon the north and east side are found the Wichitas, Caddos, Wacos, and those other small tribes which inhabit the country between the Washita and Red River. The Brazos forms the boundary between the Comanches and the tribes living east of it, and the latter are not suffered by the Comanches to hunt upon the west side of this river.*

Three years later (1852) on his return from the sources of Red River, Marcy found the remains of Wichita villages at Mount Scott, and their actual villages at Rush Springs, and reported as follows (the italics are ours):

*Sen. Ex. Doc., No. 64, 31st Cong., 1st sess., pp. 217, 219.

The particular district embracing the Wichita Mountains has for many years been occupied and (*with much justice, it seems to me*) claimed by the Wichita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they continued to live and plant corn for a long time.

Notwithstanding this claim of the Wichitas, *which the right of occupancy and possession has guaranteed to them*, yet the whole of this beautiful country, as far as the 100th degree of west longitude, is included in the grant made by the United States to the Choctaws, who thereby possess the greater part of the lands upon the upper Red River.*

And subsequently he says under date of July 19, 1852:

We passed two old Indian villages, which John Bull, one of the hunters, says were formerly occupied by the Wichitas and Kechies; several of the lodges were still standing, with their old cornfields nearby.

Our camp is upon the creek about a mile above the last village occupied by the Wichitas before they left the mountains. *Here they lived and planted corn for several years*, and they have exhibited much taste and judgment in the selection of the site of their town. It is situated at the eastern extremity of the mountains, upon a plateau directly along the south bank of the creek, and elevated about a hundred feet above it, commanding an extensive view of the country towards the North, South, and East. * * *

This must have been a favorite spot with the Indians; and why they abandoned it I can not imagine, unless it was through fear of the Coman-

*Marcy's Exploration, etc., p. 69.

> ches. *It is nearly two years since they removed from here*, and their lodge frames are still standing, with the scaffolds upon which they dried their corn. (Explorations, etc., p. 72.)

The first report (1849) was made from the Texas point of view, and entirely accords with Catlett's of the previous year. Marcy's observations, in 1852, but strengthened his previous opinion in favor of Wichita right of occupancy north of Red River. He spoke with evidence of recent occupation before him.

The agent's report mentioned by the court below was that of Mr. Stem, which gives the following census of Indians at his agency and comments thereupon:

Towaccaros	141	
Wacoes	114	
Keechies	38	
		Total 293, Warriors 90.
Caddos	161	
Andaicos	202	
Ionies	113	
		Total 476, Warriors 161.
Delawares		Total 63, Warriors 31.
Shawnees		Total 70, Warriors 35.
		Total 902, Warriors 317.

* * * * * * * *

> It will be seen, upon examining the files of the Department, that the tribes above enumerated, including the Wichitas, were, in 1849, reported officially as having 800 warriors, and numbering 4,000 persons. The Wichitas were represented to me as a small tribe, numbering 100. They, together with about 80 warriors from the Caddoes, Wacoes, and Keechies (including about two-thirds of the latter tribes), together with a small proportion of women and children, have within the last

> two years, left Texas, and are now inhabiting the Wichita Mountains, beyond Red River. But deducting these, the above enumeration shows that former estimates have been very much too large, and I entertain no doubt that upon actual enumeration it will be found that there has been a proportionate overestimate of the other Indians in Texas.*

The 1849 report, referred to by Stem, was by Neighbors and is found on page 28 of the annual report of that year.

Neighbors had given the following census of Indians under his agency:

Comanches	20,000
Kiowas	1,500
Lipans	500
Caddos, Ionies, and Anadalikas	1,400
Keechies	300
Wichitas, Wacos, and Tahwaccarros	1,000
Toukahiras	650
Delawares and Shawnees	650
Creeks (50), Cherokees (25)	75
Apache bands	3,500
Total supposed number	29,575

Of these, one-fifth were estimated as warriors.

Neighbors further says, referring to them all:

> These Indians range promiscuously across our frontier, from Red River to the Rio Grande, during the greater portion of the year; and seek shelter during the winter in the upper Cross Timbers of Texas, between the head waters of the Colorado River and the Wichita Mountains.

The 1851 report, by Stem, shows conclusively that the

*Report Com. Ind. Aff., 1851, p. 261.

number of Wichitas living in Texas had been very much overestimated by Neighbors, and as Marcy reported, after personal examination, that there were 500 Wichitas living at Rush Springs, in 1852, those mentioned by Stem were but a small portion of the whole tribe. The fact that they were accompanied by a "small proportion of women and children," indicates that it was in the nature of a war party, which again accords with Catlett. The court can little afford to disregard the opinion of so careful an explorer as Marcy.

In 1852, this same agent, Stem, reported that certain Texas Indians had summered *in the vicinity of the Wichitas* engaged in the chase *beyond the Wichita Mountains*, as was their custom.*

In 1853, Agent Capron, of the Texas Indians, reported as follows:

> Now, as to the right of the Wishitaw Indians over this country. I have taken the pains, by a visit to their nation and by conversation with old and influential Indians and whites, to possess myself with facts which, with other information in relation to this tribe of Indians, will be found in its proper place in this report.
>
> * * * * * * *
>
> The Wishitaws, with whom are associated the Kechies, Wacoes, and Tewakanies, all talking the same language and claiming to have the same origin, occupied a country, taking in a portion of northwestern Texas, running east to the mouth of the Washitaw, thence north to the Canadian, and west, taking in the Wishitaw Mountain. This was originally their country, and to which they now lay claim with all the evidence that can sustain any Indian title, clear and indisputable, they never having by treaty or otherwise relinquished their right

*Report of Com. Ind. Aff., 1852, p. 144.

> to it. They say they have been driven from that portion of their country which lay within the territory of Texas, and the United States has taken the balance, giving it to other Indians, the Choctaws, Cherokees, and Creeks, without their consent or compensation.*

In 1854 Special Agent Hill, in discussing the rights of the various tribes to settlement in the Texas reservations, reported:

> The Wacos, Tawaccamos, Keechies, and Wichitas, though considered in charge of this agency, have not, at any time during the year, been located within the limits of this State. * * * The Wacos, Keechies, and Tawaccamos, numbering about three hundred souls, have a claim to be located in Texas, which I am of the opinion may be done. * * *
>
> I have not been able to discover any well-founded claim for the settlement of these people (Wichitas) in Texas, nor do I learn that they desire it; on the contrary, from the best information I have been able to obtain, they claim a home north of Red River, in the vicinity of the Wichita Mountains, from early and long occupancy. Any attempt to remove them from that locality, and settle them among a people upon whom they have only looked for years as enemies, and yet do, could not fail to be attended with many and serious difficulties.†

In 1855, Superintendent Neighbors reported from Texas the number of Indians on the Brazos reservations, and further said:

*This report, by Horace Capron, afterwards Commissioner of Agriculture, was in evidence in the court below, but inadvertently omitted in making up the record.

†Report of Com. Ind. Aff., 1854, pp. 372-3.

> I have had application from the Wichitas and a number of other Indians who do not belong to Texas, for permission to settle on the reservations, but in conducting the settlements I conceived it to be my duty to prohibit the introduction of any Indians not properly belonging to Texas.*

In 1859, Superintendent Rector, detailed to find a permanent location for the villages of the Wichitas and their Texas kindred, in the recently formed "Leased District," reported:

> Of the country on the Canadian selected by the Wichitas and Kichais, I obtained accurate information from Se-kit-tu-ma-qua, my Delaware interpreter, who is thoroughly acquainted with it; and I, therefore, did not deem it necessary to examine it in person. The Wichitas and Kichais all desire to settle there, *and as they have resided in this region from a time beyond any one's memory*, they ought, I think, to have the privilege of selecting their own home.†

With the foregoing reports of Government agents before it, all supporting the claim of the Wichitas to occupant rights around the Wichita mountains, the Indian Department could not but be impressed with their justice and accuracy. They were, as we have seen, as follows:

Council Springs treaty commissioners	1846
Chicasaw agent	1849
Agent Catlett	1849
Captain Marcy	1849
Agent Stem	1852
Captain Marcy	1852
Agent Capron	1853
Agent Hill	1854
Superintendent Neighbors	1855

*Indian Report, 1855, p. 180.

†Ex. Doc. No. 13, 48th Cong., 1st sess., p. 21.

And with these reports before it the department received, in 1855, the suggestion of Superintendent Neighbors, that an arrangement be made with the Choctaw and Chickasaw delegates then in Washington, to lease a part of their territory for the Wichitas and neighboring prairie tribes. Of this we shall speak more fully.*

Based upon the foregoing historic facts, and the reports of accredited agents of the Government whose duty it was to advise it on such matters, and in the absence of ought but inferences to the contrary, we submit that we have sustained our contention that the Wichitas have occupant rights to the land at issue herein as a part of the Great Prairie west of the Cross Timbers. Their villages lay therein from the earliest report from Spanish sources (1778) until they sought refuge at Fort Arbuckle, in 1858, escaping from hostile Comanches on the warpath, and especially irate against the Wichitas because of their supposed complicity in an attack upon them by United States troops under Van Dorn.

The Wichitas were residents of the Great Prairie when the United States were fighting for their independence; when they purchased the territory from France, in 1803; when they made their treaty of limits with Spain, in 1819; and when they first sent a representative (Dodge) to visit the country of these Indians, in 1834. Their villages were

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Washington City, D. C., February 1, 1855.

*Sir: I have the honor to suggest the propriety of negotiating with the Choctaw delegation now at Washington for a tract of land lying on the east side of Red River (known as Cache Creek), near the Wichita Mountain, for the colonization of the Wichita Indians, and such other prairie Indians as may be convenient to that location; also for the establishment of an agency or subagency. The honorable Secretary of War informs me that in the event of it becoming necessary, he will establish a military post at that point. (Doc. No. 13 supra, p. 15.)

there and their hunting grounds when the treaty of 1835 was made; and there they have continued to live until the present day. Their occupant rights extend as far as their hunting grounds, and these were bounded on the north by the Canadian; to that stream, therefore, we claim rights of occupancy. It was a knowledge of these facts that caused army officers of the day to refer to that section as "the Wichita Country." (Maj. Emory, Rec. 190.)

The court below says that while the country was successively under French, Spanish, Mexican, and Texan rule, that neither recognized the Wichitas as occupants thereof. In the first place the country north of Red River never was under Mexican or Texan rule, and secondly, none of the four powers ever made a treaty affecting this territory with any of the prairie tribes. The treaty of 1835 with the United States was the first, and the Wichitas were parties to that.

Opposed to this Wichita claim of occupant rights the Government sets up a title under the Quapaw treaty of 1818, by which it pretends to have extinguished the Indian title to a tract of land extending to the 105th meridian. As we have shown in the statement of the case, and as is shown by the red lines on the argument map on the end of this brief, this cession had the following bounds:

> Beginning at the mouth of the Arkansas River; thence extending up the Arkansas, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red River, and down the middle of that river to the Big Raft; thence a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansas.

But we submit that the United States acquired no title

from the Quapaws to the lands at issue in this cause, as the Quapaws never occupied them and had no title to cede.

The Quapaws, or Arkansas, lived, when first known by the whites (1682), on the Mississippi, near the mouth of the Arkansas River. (Rec., p. 146.) Later they spread up the latter stream (Joatel, 1687, ib.), although some still lived on the Mississippi, and the movement was still continuing in 1722, when La Harpe ascended the river. (Rec., p. 158.) They then knew nothing of the Indians living beyond the forks of the Arkansas, at longitude 95. (La Harpe, 6 Margry, 363.) They were not then Indians who roamed and hunted over great areas, as they possessed few horses. (Account of Fabry de la Bruyière, 6 Margry, 483.) In 1758 they resided four leagues from the mouth of the Arkansas and on its banks. (Le Page du Pratz, Rec., p. 226.)

In 1803 Dr. Sibley reported to the Government that the Quapaws lived twelve miles above Arkansas Post in three villages, and claimed the territory to the Cadron; that the Osages claimed above that. (Am. St. Pap. Ind. Af., Vol. II, p. —) In 1806 Major Stoddard wrote that they lived in two villages above Arkansas Post, and were much reduced in numbers, because of wars with the Chickasaws and use of ardent spirits. (Sketches of Louisiana, p. 206.) In 1816 Auguste Choteau, one of the commissioners who made the treaty of 1818, reported on the limits of the Quapaw country, which he also carried to the Cadron, or Quadrant, as he calls it.* (Rec., p. —.) This is also shown on the map which is printed in the record at page 159.

In 1818 Major Long reported that the Quapaws resided on the Arkansas 100 to 150 miles from its mouth. He says that they originally claimed a tract forty by fifty miles,

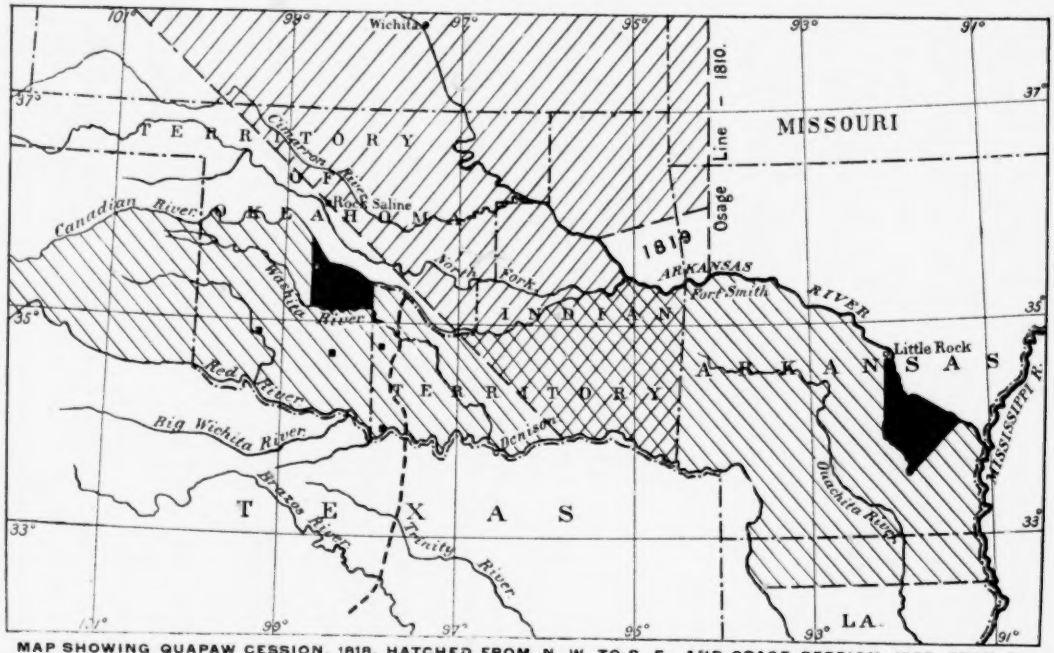
*That Cadron and Quadrant are the same see Nutall's "Travels into Arkansas Territory," 1819, p. 219.

extending west from Arkansas Post, but that they had, through the instigation of whites intermarried with the tribe, extended their claim as far west as the Forks of the Arkansas (95°). (Rec., p. 169.)

Before General Clark (who, with Choteau, negotiated the treaty) left Washington (February 6, 1818), he advised the War Department to have the Quapaw cession embrace all the white settlements, and in forwarding the treaty (September 6, 1818), he exultantly informed the department that he had not only accomplished this, but that he had obtained lands far to the west. The Quapaws freely sold him what belonged to other Indians. (Am. St. Pap. Ind. Af., Vol. 2, pp. 173 and 177.) They reported that all the villages were in the reservation provided for by the treaty and shown in red on the map at the end of this brief. In 1818 Commissioner Clark wrote to the Secretary of War that the Quapaw cession contained about 30,000,000 acres, and so it would if the map attached to the treaty were correct geographically. The same limits, geographically correct, contain more than 43,000,000 acres.

From the nearest village of the Quapaws to the 98th meridian is 340 miles, 200 of which was certainly dominated by the Osages, hostile to the Quapaws, and there is not one iota of proof that any war or hunting party of the latter tribe ever penetrated it before 1818. And yet their cession extends to the Rocky Mountain, at longitude 105.

This territory being received, as we are told, from the Quapaws, in 1818, was ceded, for the most part, to the Choctaws in 1820. But in order to make this latter cession good, it was found necessary to buy out the Osage rights in 1825. In forwarding the 1818 treaty the commissioners claimed that the Osages admitted that it only covered Quapaw lands. Why, then, any necessity for the Osage cession, which superposes on the Quapaw cession, as shown by the map on the opposite page?



MAP SHOWING QUAPAW CESSION, 1818, HATCHED FROM N. W. TO S. E., AND OSAGE SESSION, 1825, FROM N. E. TO S. W. QUAPAW RESERVATION CONTAINING ALL VILLAGES IN BLACK AT EAST; LANDS AT ISSUE IN BLACK AT WEST; CROSS TIMBERS, BROKEN LINE BETWEEN 97° AND 98°.

Map showing Quapaw cession, 1818, hatched from N.W. to S.E., and Osage cession, 1825, from N.E. to S.W. Quapaw reservation containing all villages in black at east; lands at issue in black at west; Cross Timbers, broken line between 97° and 98°.

It is therefore submitted that the Quapaw cession actually included none of the land at issue herein because the Quapaw territory did not extend so far west, and that this claim of rights under the Quapaws does not in any way nullify the Wichita rights of occupancy which we have set up, and we submit, established, under this subhead.

There are physical reasons, too, why the Quapaws never went west of the 98th meridian—the barrier of the "Cross Timbers." This formed a line between the eastern and western tribes, and the Wichitas, Comanches and Kiowas did not go east of it. When Dodge wanted to take chiefs of these tribes with him to Fort Gibson, in 1834, two chiefs objected in the following terms:

> Wichita chief—We do not like to pass through the timber; it will be hard for our horses to pass through the thick timber country between us and the white men. (Rep. Sec. War., 1834. p. 81.)
>
> Comanche chief—If I go with you, I shall be afraid to come back through the timber. (Ib., p. 84.)

The Cross Timber is the eastern limit of the prairie country, runs from the Arkansas to the Brazos, and is formed of small, thickly-set trees, difficult of penetration. In the notes will be found some description of its peculiarities.*

*The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams, and an abundance of timber. This section of the

But we are told, in the opinion of the court below, that "prior to 1833 twenty-seven other tribes resided between the Red River and the Canadian." (Rec., p. 374.) The names of these twenty-seven tribes were culled from all the old maps in the Congressional Library by the inge-

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Territory is separated from the western part, which presents a different aspect, by a broad belt of forest, known as the "Cross Timbers," which extends nearly across the Territory in a north and south direction, marking the outcrop of the Carboniferous formation. Its breadth ranges from 40 to 60 miles.

West of this singular strip of forest the country assumes the appearance of the "Great Plains"—that long incline which stretches eastward from the base of the Rocky Mountains. The surface is a monotonous, rolling, treeless expanse. The valleys are shallow, and the dividing ridges are broad and slightly marked. Timber is found only in the river valleys, on the faces of the bluffs, and among the hills.

The generally level surface of the prairies and plains is broken in the southern and southeastern parts of the Territory by ranges and groups of hills, which rise from a few hundred to 1,500 feet above the surrounding country. These hills, known as the Sans Bois Hills, Shawnee Hills, Wichita Mountains, etc., form a part of the Ozark Mountains, which extend eastward over into Missouri and Arkansas.

The principle rivers of the Territory are the Arkansas with its branches, the Neosho, the Salt and Red Forks; and the Canadian, with its North Fork, and, in the southern part of the Territory, the Red River, which forms the southern boundary, with Texas, and its branch, the Washita. All these are of little or no importance as regards navigation. The eastern part of the Territory is well watered, but the western part, except at the times of flood, in late spring and early summer, has few flowing streams.

(Henry Gannett, in American edition of the Encyclopaedia Britannica, title "Indian Territory."

*The celebrated Cross Timbers, of which frequent mention has been made, extend from the Brazos, or perhaps from the Colorado of Texas, across the sources of Trinity, traversing Red River above the False Washita, and thence west of north, to the Red Fork of Arkansas, if not further. It is a rough hilly range of country, and, though not mountainous, may perhaps

nious counsel for the Chickasaws, and even he makes the northern limit the Arkansas and not the Canadian. Most of these names are not capable of identification with any known tribes of Indians. Not one of the maps of this country has any claim to be an authority on these wilds

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be considered a prolongation of that chain of low mountains which pass to the northward of Bexar and Austin City in Texas.

The Cross Timbers vary in width from five to thirty miles, and entirely cut off the communication betwixt the interior prairies and those of the great plains. They may be considered as the "fringe" of the great prairies, being a continuous brushy strip, composed of various kinds of undergrowth, such as black-jacks, post-oaks, and, in some places, hickory, elm, etc., intermixed with a very diminutive dwarf oak called by the hunters "shin oak." Most of the timber appears to be kept small by the continual inroads of the "burning prairies;" for, being killed almost annually, it is constantly replaced by scions of undergrowth, so that it becomes more and more dense every reproduction. In some places, however, the oaks are of considerable size, and able to withstand the conflagrations. The underwood is so matted in many places with grape vines, green briars, etc., as to form almost impenetrable "roughs," which serve for hiding-places for wild beasts, as well as wild Indians; and would, in savage warfare, prove almost as formidable as The Hammocks of Florida.

South of the Canadian, a branch of these Cross Timbers projects off westward, and afterwards cross the stream; and, having continued up for a hundred miles, it inclines northwest beyond the North Fork, and ultimately ceases, no doubt, in the great sandy plains in that direction.

(Gregg's "Commerce of the Prairies," 1842, Rec.)

This extensive belt of woodland (the Cross Timbers), which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide, and extends from the Arkansas River in a southwesterly direction to the Brazos, some 400 miles.

At six different points where I have passed through it, I have found it characterized by the same peculiarities; the trees, consisting principally of post-oak and black-jack, standing at such intervals that wagons can without difficulty pass between them in any direction. The soil is thin, sandy, and poorly watered. This forms a boundary line, dividing the country suited to agriculture from the great prairies, which, for the most part, are

before Pike (1810), and Pike is not cited. After him is the map of Pinkerton, reprinted in the Government brief. The Pawnee and Kansas hunting grounds (two of the twenty-seven) are shown by Pinkerton north of the Canadian. The names "Cancatinos," "Canensis," and "Quichicons," in Pinkerton, are taken from Humboldt (1804) and are not Indian tribes at all, but "Ranchos stations des muletiers."*

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arid and destitute of timber. It seems to have been designed as a natural barrier between civilized men and the savage, as, upon the east side, there are numerous spring-brooks, flowing over a highly prolific soil, with a superabundance of the best of timber, and exuberant vegetation, teeming with the delightful perfume of flowers of the most brilliant hues; here and there interspersed with verdant grades and small prairies, affording inexhaustible grazing, and the most beautiful natural meadows that can be imagined; while on the other side commence those barren desolate wastes, where but few small streams greet the eye of the traveler, and these are soon swallowed up by the thirsty sands over which they flow; here but little woodland is found, except on the immediate borders of the water-courses.

(Marcy's Exploration, etc., p. 85.)

The Cross Timbers of Texas are two long narrow strips of forest region between the 96th and 99th meridians, extending parallel to each other from the Indian Territory southward to the central portion of the State, forming a marked exception to the usual prairie features of that country. They have been delineated upon several maps, but most accurately upon the one accompanying the "Report on the Cotton Production of the State of Texas, with a Discussion of the Agricultural Features of the State," by R. H. Loughridge, Ph. D., Special Agent of the Tenth Census.

(R. T. Hill, "Cross Timbers of Northern Texas," American Journal of Science, 3d Series, Vol. 33, p. 291, 1887.)

*It was from some such sources, doubtless, that Humboldt obtained information of the settlements on upper Red River, noted on his map as "Ranchos stations des muletiers," and named San Calixto, Cancatinos, Canensis and Quichicans.

(Report of Texas Boundary Commission, p. 135.)

For the Comanches, one of the twenty-seven, there is reasonable evidence of the occupancy claimed for them, and for them alone; that is evidence that they roamed over the territory at issue. And of the Comanches and Kiowas we will now briefly speak.

From early times the Comanches and Kiowas, the latter accompanied by the Kiowa Apaches, or Katakas, have roamed the prairies from the extreme north to Mexico. They have never had any fixed villages and never cultivated any crops. Their whole property has been carried around on their horses or the backs of their squaws. They have been so notoriously nomadic that it would be wasting the time of the court and counsel to prov the fact by citing authorities. Their habits did not permit of their acquiring occupant rights, and even if they could and did acquire such, they have been well taken care of by the Government. In 1867, by treaty (15 Stat., 581) a large part of the Leased District, comprising 2,968,893 acres was set apart for them. In 1892 they made an agreement with the Government for taking allotments and ceding the surplus lands to the United States for $2,000,000 (S. Ex. Doc., No. 17, 52d Cong., 2d sess.), an agreement now pending before Congress. For the 2800 members of these tribes in 1892 this gave them each 160 acres of land and $714 in cash to start their lives as citizens. The Wichitas and affiliated bands ask also 160 acres of land each, as their agreement provides, and also $1.25 per acre, or $717,500, for their surplus lands, or $677 in cash for each of their 1,060 individuals; less than the Kiowas, Comanches and Apaches are getting. So, if we must admit equal occupant rights in Kiowas and Comanches (which we do not) we also ask but equal treatment in the disposition of the lands of the "Leased District."

The Comanches signed the treaty of 1835 with the

Wichitas, and it was intended that the Kiowas should do the same, but they were absent from the council ground. They, however, did sign a similar treaty in 1837 (7 Stat., 533) to which their associates, the Katakas, or Kiowa Apaches, were parties, as well as the Tawakonies, a clan of the Wichitas. As we have shown, all these have been taken care of but the Wichitas and Tawakonies, who are before the court in this cause.

There is to be added one item of evidence about Wichita occupancy around the Wichita Mountains, as contained in the deposition of Captain Scott, U. S. A., who was located for many years at Fort Sill, after a long army career among the Indians of the West. It will be found in the record at pages 193 et seq, and shows how this claim of occupancy is regarded by these same Comanches and Kiowas. He says:

> Tabananaca, one of the old Comanche chiefs, who died about 1892, told me on one occasion that the Comanches came into this country before any other Indians (meaning the vicinity of the Wichita Mountains), *except the Wichitas*, who came first, and the mountains on the north fork of Red River, at the cattle-trail crossing, were named for Wichita Indians, and so called by the Indians before the coming of the white man. Another old Comanche chief, White Wolf by name, now living on the Comanche Reserve, who grew up with Tabananaca, has told me within a week past that the Wichitas came to these mountains before any other Indians; that the Comanches were next, and afterwards the Kiowas and Kiowa Apaches.

On redirect he says that the Kiowas, who came to these mountains after the Comanches, in using the sign language, use the sign for "mountains" to indicate the Wichitas.

That is to say, to the Kiowas, the Wichitas are the people of the mountains.

b. *The affiliated bands of Indians gave full value for their share of the lands at issue in this cause when they surrendered their homes in Texas at the instance of the Government:*

The affiliated bands may be grouped as follows: First, the Caddos, among whom are the remnants of the Ionies and Anadarkos; second, the Wacos and Tawakonies, who are clans of the Wichita tribe, but who lived in Texas for the most part; third, the Keechis, who have lived in Texas from the time of the earliest exploration; and fourth, the Delawares, of whom some few members have intermarried and live with the others.

The earliest explorers found the Caddos in the northeast corner of Texas, and western Louisiana and Arkansas, in the great bend of the Red River. They were the leading clan of a group that the French classed as Caddodaquioux, whose habitat is shown as above on all the early maps. In 1835 they surrendered their lands in the United States, comprising essentially Caddo Parish, La., and Miller County, Ark., and moved into Texas, in accordance with a treaty to that effect made with the United States in that year. (7 Stat., 470.)

The Keechis, Wacos, and Tawakonies lived farther west, around the head waters of the Brazos, and to this neighborhood the Caddos had, for the most part removed, when the Republic of Texas began to take cognizance of Indian affairs, in 1843. (Stat., Rep. Tex., 1842-3, p. 23.) A few others, at the time of the war between Texas and Mexico, moved to Caddo Creek, in the Choctaw nation, where they remained until 1859.

On the 9th of October, 1844, the Republic made a treaty with the Comanche, Keechi, Waco, Caddo, Ana-dah-kah, Ionic, Delaware, Shawnee, Cherokee, Lipan, and Tah-wah-karro tribes of Indians, in which it took to itself much the same powers that are held by the United States, agreeing to protect the tribes, forbidding their members from coming among the white settlements, regulating trade with them, and providing for the running of a line beyond which it should be Indian Country.* We have no estimate of the numbers of the different signatories to this treaty, nor of any operations under it, for, in 1845, the Republic became a State by admission into the United States and the care of the Indians devolved upon the general Government.

In 1846 the affiliated bands were parties to the treaty of Council Springs, with the United States, to which we have already referred in relation to the Wichitas. The commissioners who negotiated this treaty say, in their report transmitting it, as follows concerning these bands:

> The Ionies, An-no-dar-coes, and Caddoes * * * live upon the Brazos, about forty miles below the "Peak;" reside in villages, and their houses are made of straw, and are comfortable. They plant corn, pumpkins, &c. The aggregate of the three tribes is about fifteen hundred souls. They have intermarried with each other, and become identified as one people, controlled by one chief.†

We are told on the same page of the same report that the Wacos, Tawakonies and Keechis, numbering about one hundred and fifty each, resided on the Brazos, about one hundred miles above Comanche Peak.

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*Stat. Rep. Tex., 1844-5, App.

†H. R. Doc. No. 76, 29th Cong., 2d sess., p. 7.

As a result of the treaty of Council Springs the general Government took over the control of the Indian tribes of Texas, who placed themselves under its protection. It had no land upon which to colonize them, and the work of keeping them from hostile contact with the whites was a serious one.

In 1851 three new agents were sent among the Texas Indians, and one of them, Stem, reported to the department under date of November 1st, of that year, as follows:

> The tribes on the Brazos, especially the Caddoes, And-dai-coes, and the Ionies, are the most peaceable and well disposed of the Indians of Texas, and for several years, by their uniform good conduct, and readiness to deliver up stolen property brought among them, have maintained a good reputation among the citizens of this State. They desire and should receive, encouragement and proper consideration from the Government.
>
> Since my former report a military post has been established on the Clear fork of the Brasos, some 150 miles further up than Fort Graham. This post is beyond the several Indian villages on the Brasos, and unites the location and settlement of the adventurous citizens of this State on the hunting grounds, and perhaps upon the corn fields, and in villages of these Indians, or otherwise demand their removal beyond this line of posts; in either case it involves serious hardship upon these Indians. They have built up villages, cleared off corn fields, and established homes, which they are forced to yield up without compensation; already have several of these tribes been compelled to yield up homes thus established.*

This is the keynote of the situation as it existed for sev-

*Indian Rep. 1851, p. 263.

eral years after this date. Under date of October 8, 1852, the same agent reported:

> The Caddoes, Ana-da-kos, and Ionis have remained on the Brazos and have peaceably and quietly tilled their corn fields and followed the chase, occasionally calling on me for slight aid to make out the measure of their subsistence. The efforts of these people are much embarrassed by the constant reflection that the tenure by which they hold their homes and improvements is so slight and precarious. With the constant anticipation that the fields that they have subjugated, the warm lodges they have erected, the clear cold springs they have discovered, are to be given up to the adventurous white man, whose surveys have already enclosed and surrounded their villages and "marked their trees," they have no courage for vigorous and hopeful effort.
>
> José Maria (their chief), after the close of his "winter hunt," would not go back to his old village on the Brazos. His lands had been surveyed (a subject about which he had been extremely sensitive), and perhaps he feared interruption.*

In 1854 Texas provided for the laying out of two reservations, one of which, on the Brazos, near the mouth of Clear Fork, was set apart for the affiliated bands. Upon this reserve these Indians were settled in 1855, and Supervising Agent Neighbors reported on the 10th of September, of that year, that there were there 205 Anadahkos, 188 Caddoes, 136 Tawakonies and 94 Wacos; that they had put 400 acres of land under cultivation; and that there was no more peaceful settlement in Texas, and that the Indians were making astonishing progress in the arts of civilized life.†

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*Indian Rep. 1852, p. 145.

†Indian Rep. 1855, p. 178.

In 1856 the agent at the Brazos agency reported:

> The Indians at the several villages have neat cottages, with good gardens and fields adjacent, and the many conveniences to be seen on every hand give me abundant evidence of the progress made by the Indians since their settlement. The Caddoes and Anadahkos show a great desire for the adoption of the customs as well as the habits of the white men.*

In 1858 a school was established on the reserve, with an enrollment of 60 children and an average daily attendance of 30.† The agent reported increased good feeling towards the reserve residents by the whites of the neighborhood, and prophesied success for the experiment of colonization, "provided the protection guaranteed to them by the treaty of settlement is fully carried out on the part of the Government."‡ This result, however, was not destined to be accomplished, as in December of that year a party of Caddos and Anadarkos were murdered while asleep by some whites, and this engendered such a feeling that it seemed probable that the whole frontier would be in instant uproar.§

A state of great unrest continued through the winter, and open war between the Indians and parties of whites organized for their extermination, was only prevented by the presence of the troops. In March the Commissioner of Indian Affairs wrote to Superintendent Neighbors:

> From the information communicated in your several reports and otherwise obtained, it has become

*Indian Rep. 1856, p. 179.
†Indian Rep. 1858, p. 183.
‡Ib., p. 182.
§Indian Rep. 1859, p. 220, et seq.

> painfully manifest that the colonization of the Indians of Texas on the two reservations heretofore selected must be discontinued, the reservations abandoned, the Indians removed where they can be protected from lawless violence, and effective measures adopted for their domestication and improvement. Measures for that purpose will, therefore, be adopted with as little delay as practicable.*

The commissioner further directed Neighbors to act in conjunction with Superintendent Rector, and arrange for the settlement of these Indians in the leased District, and to effect the removal in the fall of that year.

Accordingly Superintendent Neighbors took the headmen of the affiliated bands, as well as those of the Comanches on the Clear Fork reservation, to Fort Arbuckle, where he met Supt. Rector and the Wichitas about the first of July. Rector reports, in part, as follows:

> After Mr. Neighbors and myself had fully conferred together, the headmen of all the bands, of those here and of those in Texas, met in council and were informed by him and myself of the selections which had been made for their future homes. We explained to them the great pain and regret felt by the Government at being compelled so hastily to remove those in Texas to another country, but assured them that they would be paid for all losses thus incurred, and that after removal they would occupy a country belonging to the United States, and not within any State, where none could intrude upon them, and they would remain, they and their children, as long as the waters should run, protected from all harm by the United States. We advised them to become acquainted with each other and to prepare to live

*Ib., p. 263.

near each other as friends and neighbors, and promised to use every effort in our power to see justice done them. To the Wichitas we also promised to endeavor to obtain remuneration for their losses incurred in consequence of the hostility of the Comanches, provoked by the slaying of so many of their people, encamped with peaceable intentions, by the troops of the United States; and the consumption of their corn by the troops.

The Indians declared themselves entirely satisfied with the country selected for them, well known to many of them, and ready to remove at once.*

Major Neighbors returned to the Texas reserves for his charges, and we have the following reports of the assurances he then made them:

When Major Neighbors and Captain Ross returned to the Brazos with the Indian chiefs who had been to the council at Arbuckle, the Indians were gathered together and were moved to the Indian Territory, leaving nearly all their property behind.

I accompanied the Indians north, and when they arrived on the Washita, there meeting with the Wichitas, Major Neighbors told the Indians, as he had previously told them before leaving the Brazos, that all the country from the Chickasaw line to the one hundredth meridian and from Red River to the Canadian was to be theirs and their children's for a home forever.

He told them that those who had left their houses, farms, and other property on the Brazos would be compensated for the loss, and he was going to Washington to have it replaced; to have houses built and farms made, and to have white men come and learn them how to farm, &c. He told them that they could live anywhere between Red River and the Canadian and within the ninety-eighth and one hundredth meridian.

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*Sen. Ex. Doc. No. 13, supra, p. 21.

Major Neighbors was a good friend of the Indians, and an honest man, and if he had not been killed by an outlaw at Fort Belknap, on his way to Washington, there is no doubt that all that had been promised to these Indians by him would have been fulfilled.*

Interpreter Shirley, of the Clear Fork reserve, says:

I accompanied Major Neighbors to Arbuckle as interpreter, and was present at the council held with the Wichitas, who were then and had been for a long time occupants of the country, and the Caddoes, Towaconies, Wacoes, and others from the Brazos.

At that council it was distinctly stated by the representatives of the Government, Major Neighbors and Major Rector, to the Indian chiefs there present, that the country which they gave to them in exchange for their country on the Brazos was a much larger and better country; that they were to occupy it with the Wichitas, and it was to be theirs and their children's for a home forever; that their country would extend from Red River to the Canadian, and from the creek below the Cottonwood Grove, on the Washita River, to the Antelope Hills. The boundaries thus described were for the purpose of fixing in the minds of the Indians landmarks which they could understand, but, as actually determined by Major Neighbors and Major Rector, the boundaries were defined as the ninety-eighth meridian on the east, and the one hundredth meridian on the west, the Red River on the south, and the Canadian on the north.

The Indian chiefs were told that they could live anywhere within these bounds, and that the Government would build them an agency on the Washita River, and on the sun-setting side of the agency a fort would be built, where soldiers would

*J. J. Sturm, farmer at Brazos Agency, in Doc. 13, supra, p. 38.

> stay to protect them from the hostile plains Indians and from any aggressions by the whites; that the Government would build houses for them to replace those they would leave behind them on the Brazos, and would compensate them for the loss of any property they could not bring with them, and would issue them rations of beef, flour, and salt, and annuities twice a year for five years, and for five years longer if necessary.
>
> This agreement was being carried out by the Government; houses built, and the issue of subsistence and annuities to these Indians, until the breaking out of the war of the rebellion, when the troops were ordered away from Fort Cobb, and the Indians then became afraid of the roving bands of Plains Indians, and moved away from their reservation, some of them going north into Kansas, and did not return until after the war was over in 1867.*

The removal of the affiliated bands had been accomplished in September of 1859, and the rebuilding mentioned by Shirley was in accordance with the provisions of the appropriation acts of 1860 (12 Stat., 56), 1861 (ib., 236), 1862 (ib., 527), and 1863 (ib., 790), which were

> For the expenses of colonizing, supporting, and furnishing agricultural implements and stock, pay for necessary employees, purchase of clothing, medicine, iron and steel, establishment and maintenance of schools, and building houses for the Indians lately residing in Texas, in lieu of those abandoned in that State, to be expended under the direction of the Secretary of the Interior.

Here is a congressional recognition of the liability of United States for the losses of the affiliated bands of Indians, due to the failure of the United States to accord

*Doc. No. 13, supra, p. 38.

them that protection which was promised them by the treaty of Council Springs, in 1846. The war prevented it being immediately carried out, but the liability remained, and still remains, and can not be cancelled by reducing the amount of land to be held by the Indians, and refusing them compensation for the lands in excess of this reduced amount, the whole having been promised them as a home "so long as water should run and grass should grow," in consideration of these particular losses, and the peaceful surrender of their homes south of Red River.

c. *Equitable treatment of the Wichita and affiliated bands of Indians demands that they should receive full compensation for the surplus lands of the Wichita reservation, without regard to any claims to be adjusted as between the Choctaw and Chickasaw nations and the United States.*

After the colonization of the Wichita and affiliated bands of Indians on the Leased District in 1859, as hereinbefore related, the work of settlement was continued until the breaking out of the civil war. The Choctaw and Chickasaw nations were the first to join hands with the Confederacy, and almost immediately the whole of the Indian Territory was invaded by Texan troops, aided by these nations, who drove out all Indians faithful to the Government. The very agent and superintendent of the Wichitas actively joined the Southern cause; the troops were withdrawn, upon whom they relied for protection from the prairie tribes. The Wichitas and affiliated bands fled, perforce, into Kansas, where they remained until 1867, without suitable homes, or subsistence, or medical treatment. Then they returned to their reservation to find everything destroyed.

There is no census of these Indians while on the reserve, and before the war. By the summer of 1872, after the privations of war-time, the number had been reduced to less than twelve hundred, classified as follows:

Wichitas	299	
Keechies	126	
Wacoes	140	
Tawakonies	127	
		692
Caddoes	392	
Ionies	85	
		477
Total		1,169

It was at this time that Captain Alvord, who is authority for the above figures, hastily gathered up some of the headmen of the various bands and brought them to Washington. He says: "The Caddoes and Ionies are virtually one people, and should be so regarded; and the Wacoes, Keechies and Towaccaroes, originally from Texas, have long been affiliated with the Wichitas." (Ind. Rep., 1872, p. 134.) The object of the visit to Washington was to make some agreement by which a reservation should be set apart for these Indians. (Ib., p. 140.)

Arriving here a conference was had with the Commissioner of Indian Affairs, which resulted in the execution of an agreement,* which the department forwarded to

*Articles of agreement made and concluded at Washington City, District of Columbia, this 19th day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and other affiliated bands of Indians, duly authorized to act for their people, of the other part, witnesseth:

Article 1. The United States hereby give and grant to the

Congress in January, 1873. (House Doc., No. 65, 42d Cong., 3d sess.) In his annual report for 1872 the Commissioner makes the following recommendations in regard to it:

> The Wichitas and other affiliated bands, having for a long time resided within the limits of the tract known as the "leased district," in the Indian Territory, without any defined reservation set apart for their occupancy; and having a claim, good or bad, to a large tract of country, an agreement was made by the Commissioner of Indian Affairs with a duly authorized delegation of said Indians, by which the following described tract of land is set apart for them, viz: Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of the said river to the line 98° 40′ west longitude; thence on said line of 98° 40′ due north

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said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninty-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude, thence on said line of ninety-eight degrees forty minutes due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

Art. 2. In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere, within the limits of the United States.

In testimony whereof the parties to this agreement have hereunto subscribed their names and affixed their seals on the day and year first above written.

to the middle of the main channel of the main Canadian River; thence down to middle of said main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning. In consideration for said tract of land the Indians cede and relinquish to the United States all their right, title, interest, or claim, of any nature whatsoever to any lands in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States.

These Wichitas, &c., have always been friendly and loyal to the Government; have suffered severely on that account; are a good class of Indians, inclined to labor for a support, and absolutely require a reservation which they can call their own. For these reasons, as well as to quiet their claim to unceded lands, I recommend the ratification of the agreement made with the Wichitas, &c., by Congress at its next session. (Ind. Rep., 1872, p. 101.)

Congress never confirmed this agreement. It did, however, consider the reservation as an entity, and ever since in the annual appropriation acts the language has been:

> For subsistence and civilization of the Apaches, Kiowas, Comanches, Wichitas, and affiliated bands who have been collected in the *reservation set apart for their use and occupation.*

In 1889 the Government, in carrying out its policy of settling all Indians in severalty and opening the surplus lands of the various reservations to settlement, passed the following law, as a part of the annual Indian Act:

> Sec. 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west

of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President, and by him to Congress at its next session, and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same for ratification. (25 Stat., 1003.)

In pursuance of this law the Cherokee Commission visited the Wichita reservation, considering it as a reservation, in the spring of 1891, and submitted to the Indians the following proposition:

"The undersigned commissioners on the part of the United States, appointed for the purpose, now make the following offer to the Wichitas and affiliated bands of Indians in the Indian Territory:

"The Indians shall cede and convey and forever relinquish to the United States all their right, title, claim, and interest in and to the following described tract of country, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same; thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude; thence on said line of ninety-eight degrees and forty minutes due north to the middle of the main channel of the main to Canadian; thence down the middle of the said main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning.

"The United States shall classify said country into grazing and grain growing land, and shall allot to each Indian on said reservation 160 acres of land, at least one-half of it grazing land, the title to which the United States will hold in trust for the period of twenty-five years, during which time it shall not be sold or encumbered, nor subject to taxes, nor execution for debt, and shall never be subject to execution for debt contracted or obligation arising during said period of twenty-five years.

"Should any Indian die during said period of twenty-five years, then his or her land shall descend to his or her heirs according

to the law of the State or Territory in which said land shall be situated.

"In addition to said allotments of land which may be taken anywhere in said reservation except on land set apart, used, or occupied for agency, school, military, or other Government purposes, and except sections sixteen and thirty-six, in each Congressional township, which shall be kept and finally sold for common school purposes.

"The United States will pay said Wichita and affiliated bands of Indians the sum of two hundred and eighty-six thousand ($286,000) dollars, fifty-three thousand ($53,000) dollars of which shall be distributed among said Indians per capita, within one hundred days after Congress shall ratify the agreement.

"Another fifty-three thousand ($53,000) dollars shall, within one year after the contract shall have been ratified by Congress, be paid out to or for said Indians per capita, under the direction of the Secretary of the Interior, for the purpose of improving the allotments of said Indians, and otherwise bettering their condition; the remaining one hundred and eighty thousand ($180,000) dollars shall be placed in the Treasury of the United States to the credit of said Indians, and shall bear interest at the rate of 4 per cent per annum, which interest shall be paid out annually by the Secretary of the Interior to or for said Indians, and for such purposes as to him seems best, reference being had to the comfort and advancement of said Indians in the ways of civilized life. Provided, the number of allotments shall not exceed one thousand and sixty, but if the allotments shall exceed that number then there shall be deducted from said $180,000 the sum of $80 for each allotment in excess of said number 1,060.

"Nothing in the contract shall in any manner or to any extent whatever affect any claim said Indians, or any of them, have against the United States, either for money or lands outside of the Indian Territory.

"Done at Anadarko, I. T., this 13th day of May, 1891.

"DAVID H. JEROME,
"ALFRED M. WILSON,
"WARREN G. SAYRE,
"Commissioners on the part of the United States."

Sen. Ex. Doc. No. 46, 52d Cong., 1st sess., p. 21.

It will be observed that the Cherokee Commission hereby expressly recognized the right of the Indians to be

paid for the surplus lands of the reservation, as the United States was paying Indians who claimed title under distinct and approved treaties and agreements; the only equitable way of looking at the matter. But for reasons stated therein, the Indians submitted the following counter proposition:

"To the Honorable, the Commissioners of the United States:

"The proposition submitted by you on the 13th instant has received our most earnest consideration. Impressed as we are with the gravity of the situation in which we find ourselves, and upon such consideration we are unable to agree to all said propositions.

"In reply we submit as follows:

"The proposed agreement shall be upon the terms following, to wit:

"The Indians to cede and convey and forever relinquish all their right, title, and interest in and to the tract of land described in the honorable commissioners' first proposition for and in consideration of seven hundred and fifteen thousand ($715,000) dollars.

"The said tract of land to be divided by a north and south line, so that on the east side thereof there shall be the quantity requisite for the apportionment to individuals contemplated—this land to be held by the Indians in common—the tract on the west side of said line to be opened to settlement by citizens of the United States.

"The payments of the money, the price of the land proposed to be ceded and relinquished, to be as follows:

"Two hundred and seventeen thousand ($217,000) dollars to be paid to the Indians within one hundred days after the ratification of the proposed agreement by the Congress of the United States.

"Two hundred and seventeen thousand ($217,000) dollars to be paid to the Indians within one year after such ratification.

"The remaining two hundred and eighty-one thousand ($281,000) to be deposited in the Treasury of the United States to the credit of the Indians for the period of twenty-five years and bear interest at the rate of 4 per centum, the interest to be paid annually to the Indians, and the principal to them at the expiration of twenty-five years.

"Each and every of said payments to be made directly to the Indians; each when received by them to be by them distributed among individuals per capita.

"The proposed agreement to recite that the right is reserved to the Indians to prosecute against the United States any and every claim they may believe they have the right to prefer and prosecute save and except any as to the tract of land mentioned in the honorable commissioners' first proposition.

"The proposed agreement to recite that it is made and entered into as well for the benefit of those who (citizens of the United States) are now the adopted citizens of said Indians as for the benefit of the Indians themselves.

"The proposed agreement to recite that when there is a fractional part of a section, caused by the meandering of either the Canadian River or of the Washita River, the individual whose selection shall adjoin such fractional part of a section or sections shall have the preferred right to purchase the same at the price of $1.25 per acre."

Sen. Ex. Doc. No. 46, 52d Cong., 1st sess., p. 22.

It being impossible to reach an agreement with the Commission the Indians withdrew this last proposition and submitted the following:

"To the Honorable the Commissioners of the United States:

"The Indians submit respectfully as follows:

"On yesterday they listened attentively to the arguments advanced by the honorable commissioners, respectively, in support of their proposition that the Indians accept fifty (50) cents per acre as the price of their surplus lands. They have given the arguments their most careful consideration and have to advise the honorable commissioners that they do not convince them that their price (one dollar and a quarter ($1.25) per acre), is not a just and fair one.

"They say, most respectfully, that the honorable commissioners have not viewed the entire country, and that consequently they must proceed upon hearsay and some misinformation as to the character of the lands proposed to be sold.

"The Indians have lived for years in the country, and are familiar with it. Fitness for farming is not the only test of the value of land. There is such a thing as land having value for grazing purposes, and the Indians insist that the country proposed to be sold is, as a whole, well fitted for grazing purposes,

and in the market, if competitive bids were permitted, would bring to them more than the price ($1.25 per acre) they ask. This independent of the quantity of land really good for farming purposes and the large quantity of valuable timber, walnut, &c., &c., there is upon it.

"The Indians ought not to be in any the least degree held responsible for the policy of the Government of the United States acting in this behalf for the advantage of their citizens, and they do not see any soundness in the logic that proposes to them that if their surplus lands can be sold for grazing purposes at $1.25 per acre, and possibly a great deal more if competitive bids at a sale, public or private, were permitted—that because the United States desires to dispose of it as farming land they should sell at 50 cents per acre simply because it is possibly worth only that much for farming purposes—something that is not at all admitted by the Indians.

"The Indians have been most solemnly assured that it was not the intention of the United States in creating the honorable commission to negotiate with them to make money at their expense. The Indians, nevertheless, respectfully submit that if their surplus lands can be sold for grazing purposes at $1.25 per acre, then, if not the United States, some whom the United States seek to favor will make money at the expense of the Indians if they be constrained to sell for 50 cents per acre simply because the United States will force a sale of the land ostensibly for farming purposes at which only the United States can purchase.

"Now, in consequence of these facts, namely: That the price of the land is really the only substantial question at issue between the Indians and the honorable commissioners;

"That it is the Congress of the United States who control the purse of the United States, and can and will say ultimately what price per acre shall be paid for the Indians' surplus lands;

"That Congress has not said that the honorable commissioners shall not offer and agree to pay to the Indians $1.25 per acre, if it be just and fair that that price should be paid for the surplus lands;

"The Indians, who seek to be fair and just, do, in order to manifest this, desire that if it be relegated to the Congress of the United States to determine upon consideration of all existing facts and equities what shall be the price to be paid and the amounts of the respective payments,

"The Indians, looking to such a solution of the question at

issue, propose respectfully that a paper be made in due form reciting all the propositions that are agreed upon and complete, with the single exception of appropriate blank spaces for the insertion, first, of the amount that the Congress shall determine as the price of the surplus lands, and, second, for the insertion of the amounts of the payments thereof.

"The Indians, taught by experience, know well enough if they make a paper with the honorable commissioners saying that they are willing to take 50 cents per acre, when in their hearts they are not willing to do so, and do it only as a way of ending a prolonged and tiresome discussion, and with a hope that notwithstanding the paper the equities of the case will be considered by Congress, and they be paid more than the paper promises will be paid, that the paper will be held against them and they, to their grievous disappointment, will get no more money than the amount named in it.

"The Indians know full well that they can not, and will not, receive any money until the meeting of Congress in December of the present year, and even not then until there is a contract binding the Indians that is approved by Congress; this whether they do or do not now make with the honorable commissioners a full and complete paper.

"Such being the fact the Indians further respectfully submit that neither the interest of the United States nor those of the Indians will be in the least prejudiced by the making of such a paper as is hereby just above proposed.

"In Council, June 2, 1891." (Ib.)

Under this last proposition the agreement was finally signed, and the question was left to Congress as to how much the Wichitas were to receive for their surplus lands. It was not thought for a moment by the Indians that Congress would be so unjust as to give them no compensation whatsoever.

By executive order of August 10, 1869,* the President set apart for the Cheyennes and Arapahoes the whole northern portion of the "leased district," including the Wichita reservation as subsequently formed (1872). This

*Ex. Doc. No. 13, supra, pp. 57-9.

was held by these Indians, although but six hundred of them resided south of the Canadian,* until they took allotments and ceded the surplus lands to the United States, which they did by an agreement executed in November, 1890.† This cession included the whole of the Wichita reservation, its lines extending east to the 98th degree of longitude. (See Article II.)

It was upon the consideration of this agreement that Congress recognized, under misinformation, as we contend, the claim of the Choctaw and Chickasaw nations, that the leased district was held in trust, and paid them for their alleged interest in these surplus lands. (26 Stat., 1022.) These nations were not then paid for any portion of the Wichita reservation, they actually having received $2,942,650,‡ or $1.25 per acre for 2,354,120 acres; the other 135,040 acres having been allotted in severalty to the Indians, and there being, in all, 2,489,160 acres in that part of the cession south of the Canadian not occupied by the Wichitas. *In that case Congress did not pay the Choctaws and Chickasaws for the lands allotted in severalty to the Indians which the said nations seek to have done in the present case by their cross-appeal.*

When the Wichita agreement was forwarded to Congress, in January, 1892,§ it was with the expectation on the part of the Executive that the same claim would be pressed by the Choctaw and Chickasaw nations in regard to this land, and Secretary Noble reported that in his judgment these nations had no legal or equitable right to such compensation.¶ A month later President Harrison sent a mes-

*Sen. Ex. Doc. No. 42, 52d Cong., 1st sess., p. 12.
†Sen. Ex. Doc. No. 1, 51st Cong., 2d sess.
‡Sen. Ex. Doc. No. 8, 53d Cong., 1st sess.
§Sen. Ex. Doc. No. 14, 52d Cong., 1st sess.
¶Ib., p. 1.

sage to Congress* protesting that he would not have approved the appropriation had it not been in a general bill and the end of the session at hand.

Congress, however, approved its previous action by resolution, but did not act on the Wichtia agreement, which went over to the 53d Congress, when it was reported in the third session as a part of the Indian bill, the question of compensation for the surplus lands being referred to the Court of Claims to adjudicate between the Wichitas and affiliated bands on the one hand, and the Choctaw and Chickasaw Nations on the other. This reference is in the following language:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

The decree of the Court of Claims under this jurisdictional Act permits the retention of the allotments by the Wichitas and affiliated bands, a gratuity, be it said, as we shall contend later that the Act gave it no power to pass upon this question. It also held that the Choctaws and

*Sen. Ex. Doc. No. 42, supra.

Chickasaws, and not the Wichita and affiliated bands shall receive the proceeds of the sale of the surplus lands. If this be affirmed by this court it will be the first instance when the United States will have allotted lands in severalty to Indians without one cent of capital to start them on the white man's road of citizenship, upon which the taking of allotments turns them adrift.

In forwarding the Wichita agreement of 1891 to the Secretary of the Interior on its way to Congress, the Commissioner of Indian Affiairs used the following language:

> While the Wichitas have no well defined tenure in these lands, and may in fact be said to have occupied them by sufference, nevertheless, under the general allotment act of February 8, 1887 (24 Stat., 388), as construed by the Attorney-General no part of these lands could be taken from them without their consent, they having been, in effect, set apart for their use by Executive action and recognized by congressional appropriation. (Doc. No. 14, supra, p. 4.)

The same jurisdiction rests in this court as in the court below, to determine the "rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichitas and affiliated bands of Indians." Each has the right to have these determined, equally with the other. The Court of Claims held that because the Choctaw and Chickasaw nations had rights as against the United States, therefore the Wichita and affiliated bands had none. This was the effect of the decree.

We submit, however, that when the Wichita and affiliated bands signed the agreement of 1891 they submitted their rights to Congress untrammeled with any question of the rights of other Indian nations. If the United States is indebted to the Choctaws and Chickasaws, and this court

so holds, why should the Wichita and affiliated bands be relegated to some other forum, to seek the subsistence that they must needs have or perish. Is it because the United States would otherwise pay twice for the lands at issue herein? They have constantly done this, and will again. They paid twice for the whole of the Choctaw and Chickasaw nations; once to the Quapaws, in 1818, and once to the Osages in 1825. They paid twice for the Cheyenne and Arapahoe lands south of the Canadian, once to those tribes, and once to the Choctaws and Chickasaws. If the agreement made with the Kiowas, Comanches and Apaches is approved and carried out, they will pay those tribes for most of the balance of the leased district, whether the rights of the Choctaw and Chickasaw nations therein are sustained or not. If it is inequitable that the United States should pay twice to extinguish Indian title, why begin to enforce a rule against the Wichitas and affiliated bands, a feeble body, for the benefit of the Choctaw and Chickasaw nations, relatively rich and strong. Does not the United States owe more generous treatment to its more ignorant wards; for no one will contend that the Wichita and affiliated bands are on the same plane of intelligence as their present opponents.

Again, must we suffer, as our opponents would have us, because in the early days of white invasion the Wichitas had a bad reputation for horse stealing. This was the tenor of the plea in the Court of Claims by the learned counsel for the Chickasaws. But admitting, for the sake of the argument that the Wichitas are not blameless in this regard, we challenge him to produce one iota of evidence against the Caddoes. And the Caddoes the larger part of the Indians whom we represent. In 1891, when the agreement was made, the agent reported 1,066 Indians

on the reservation,* although but 1,060 are considered in the agreement. These are made up of the following bands:

Caddos	545
Wichitas	175
Towaconies	150
Wacoes	35
Keechies	66
Delawares	95
Total	1,066

As we have seen these Caddos and some of the others came from Texas, and as we have contended, gave value for the lands they received on this reservation, in return for those which they gave up south of Red River. Since the war there has been no complaint of depredations among these tribes, beyond the usual bad men that will be found in every community of the same size. The Caddos have been frequently referred to as the best Indians on the continent, and they deserve fair, honest treatment at the hands of the United States.

As we have said the only matter submitted to Congress by the Wichita and affiliated bands was the amount to be received for the surplus lands, whether fifty cents or more. Equity demands that this matter should be fairly met by this court before it shall be complicated by the consideration of the demands of the Choctaws and Chickasaws. We feel that we have fairly set before the court the claims that these Indians have to compensation in the full value of these surplus lands, by the aboriginal occupancy of the Wichitas and the promise that was given the Texas Indians of a home so long as water should run. We feel that due

*Ind. Rep. 1891, Vol. I, p. 352.

consideration should be given by the court to the promise that the Wichita and affiliated bands should be allowed to retain the reservation *for a home*, as embodied in the unratified agreement of 1872. It was not the intention of the Indians, in 1891, to rob themselves of all means of making a livelihood, by giving up lands that they could not have been compelled to surrender. If the United States desires to open these lands for settlement, let them be permitted to pay for the lands at a fair price, what they propose to sell them for, $1.25 an acre. That is what the Government contends for in this case, and we submit that it should be allowed to carry out this policy without being prevented by the consideration of the claims of the Choctaws and Chickasaws. No trustee has the right to buy in the realty of his cestui-qui-trust to his own advantage, nor a guardian that of his ward. The same equitable principle applies to the Government as towards its wards, the Indian tribes, and the more ignorant and feeble they are, the more rigorously this rule should be applied.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE WICHITA AND AFFILIATED BANDS OF INDIANS ARE NOT ENTITLED TO PAYMENT FOR THE SURPLUS LANDS OF THE WICHITA RESERVATION AFTER ALLOTMENTS HAVE BEEN MADE TO THE INDIVIDUAL INDIANS.

This is but a corollary of the first assignment of error. If the Wichita and affiliated bands of Indians are entitled to all rights incident to occupancy, the United States can not divest them of these rights without due compensation.

The act of 1830, which provided for the removal of the Choctaw and other tribes of Indians from the east of the Mississippi, and their settlement upon the lands west thereof, required, as a prerequisite to such settlement, the extinguishment of the existing Indian title to the western lands. Our claim throughout this brief has been that the Wichitas have occupant title to the lands at issue herein, to which the affiliates were admitted in 1859, and that that title has never been extinguished. By the treaty of 1891, when finally ratified and carried out, this will be accomplished; but as to the surplus lands, this extinguishment can only be effected by due compensation to the owners of the occupant title, the Wichita and affiliated bands of Indians.

III.

THE COURT BELOW ERRED IN HOLDING THAT THE LANDS AT ISSUE IN THIS CAUSE ARE HELD BY THE UNITED STATES SUBJECT TO A TRUST FOR THE SETTLEMENT OF INDIANS THEREON.

a. *The act of Congress of March 2, 1895, conferring jurisdiction on this Court to try and determine this cause on appeal, gives it no unusual, extraordinary, or extra-judicial powers, as the Choctaw and Chickasaw nations contend.*

It seems to be asserted by these nations that the act giving this Court jurisdiction to "try and determine" this cause revolutionizes the settled laws of evidence and of statute and treaty construction. They hint that Congress intended this and naively move this Court to suspend the rules of law by a sort of unanimous consent *in favorem* the Choctaws and Chickasaws. They say that everything possible should be presumed in their benighted behalf, but

seem to concede the defendant Indians a degree of culture high enough to have everything presumed against them, although the very title of this cause declares that it is the suit of the Choctaw *nation* and the Chickasaw *nation* against the Wichita and affiliated *bands* of Indians. In behalf of these feeble Wichitas and their few affiliated friends we dispute this first claim of these two great civilized and powerful antagonists. The act sending the case here is capable of no such construction. When Congress was about to finally settle the Wichitas and affiliates in the lands in question, these nations interposed and set up their shadowy and belated pretext to title, and ultimately forced the case to this Court.

Let the act speak. It says with a slur on the claimants—

> "That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the land ceded by the foregoing agreement, which claim is controverted by the United States."

But Congress does not controvert the title of the Wichitas. Again, the act guardedly says (for Congress knows the claimant nations to its cost):

> "Nothing in this act shall be accepted or construed as a confession that the United States admits the claims of the Choctaw and Chickasaw nations."

But no such words of caution are used as to the defendant bands.

Again the act says that "if the Choctaw and Chickasaw nations do not bring their action within ninety days from the approval of the act, their claim shall be forever barred." It makes no such peremptory foreclosure against the Wichitas. It simply says that if they fail to file their

answer within sixty days after notice from the attorney general "they may be barred from all claim in the premises."

The whole text of this jurisdictional act shows that Congress was glad to get rid of these crafty and clamorous claimants. Hence we are not surprised when, in line with Congress and the right, the learned counsel for the United States filed his thorough and able brief in this cause controverting the claim of the Choctaw and Chickasaw nations and admitting, as Congress did, the just and legal title of the defendant bands to the territory in question.

If established law is to be set aside in this cause for the claimant the warrant to do so must be found in these words of the jurisdictional act:

> "It being the intention of this act to allow the said Court of Claims jurisdiction so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined and to try and determine all questions that may arise on behalf of either party in the hearing of said claims."

These are the usual words by which power is conferred on the Court of Claims by Congress to try and determine a cause. It is a case which this Court is to try and determine by the settled rules of law and not by that novel and elastic code called in derision "Indian law," which seems to have governed the Court of Claims in its decision, and it is a case that comes here with almost the condemnation of Congress upon the nations in the very words of the act under which this Court takes power to hear it.

Yet all through the able briefs of the nations' counsel runs a current of claim for some sort of broad latitude to be given them under the jurisdictional act as "Indians,"

forgetting that the Wichitas and the affiliates are Indians, too, and entitled to the same sort of liberality; whatever it may be and whatever it is we crave it, too.

The very question of the jurisdiction conferred on the Court of Claims by a like act of Congress has been decided by this Court in the United States vs. The Old Settlers, &c., 148 U. S., 509, in which case the act of Congress giving jurisdiction was that:

> "It is the intention of this act to allow the said Court of Claims unrestricted latitude of adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and the said Indians may be fully considered and determined."

In construing what was meant by these words, this Court said:

> "While it was stated (by the Court of Claims) that Congress might confer upon that Court extra-judicial powers, yet the Court was of the opinion that this could not have been held to have been done by the act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the plaintiffs or defendants, might be appealed to the Supreme Court, whose jurisdiction as defined by the Constitution was strictly judicial, and could neither be enlarged nor diminished by legislative authority."

So in this case further on the Court says:

> "The Court of Claims was indeed to have unrestricted latitude in adjusting and determining the said claim so that the rights, legal and equitable, both of the United States and the said Indians, may

> be fully determined and considered, but this did not mean that either party was entitled to have or receive, by virtue of the act, anything more than they were entitled to under the stipulations, or to bring supposed moral obligations into play for the disposal of the case."
>
> "The inquiry was not to be technically limited by rules of procedure or restrained by the distinctions between law and equity, * * * but the language used did not involve the confusion of the respective powers of the departments of the Government, nor furnish a basis for an external attack upon theory of executive or legislative action."

It is difficult to see how the case at bar differs from the Old Settlers' case, and the Court of Claims in its opinion is very discreetly silent upon that point, except to say:

> The act conferring jurisdiction is misleading and delusive if without the power to direct the court to consider the treaty as a contract and apply the rules which obtain in equity to ascertain its meaning. Congress has shifted the responsibility of reaching the intent of the treaty upon the court.

The above language of the Court of Claims is somewhat mystical in meaning, but "to consider the treaty as a contract" must mean that it should be subject to equity rules for recession, as for fraud or duress, or reformation for mistake or inadvertent omissions, etc. Yet this court in the Old Settlers' case distinctly decided that it had no jurisdiction to avoid a treaty for duress or fraud.

What the Court of Claims could have meant by saying that unless they reformed the treaty of 1866, as they have sought to do, the jurisdictional act was "delusive" and "misleading" and ineffective, is difficult to conjecture.

If they had decided that the treaty of 1866 was an absolute cession, and that the Wichitas and affiliates were entitled to the proceeds of their lands, and that all claims of the Choctaw and Chickasaw nations thereto had been settled and paid for by the United States giving them one million one hundred thousand dollars, the act would have been effective enough and just enough. The Court of Claims seem to think that the jurisdictional act gave them power to decide one way only, and that unless they went to treaty making and treaty breaking their occupation was gone so far as this case was concerned.

b. *The treaty of 1866, by which the nations, for $300,000 paid them, cede or sell to the United States the territory in dispute and a part of the lands by them leased to the United States in 1855 for $800,000, is clear, explicit, and unambiguous in all its terms.*

The counsel for the nations have considered that the only part of that treaty sufficiently important to them was the third article. It contains the cession of the territory in question; and, if any ambiguity exists, it must arise from the language of that section, for they are not permitted to arbitrarily insert a section in a treaty and then say that the treaty is ambiguous. Let us analyze the third article and divide it into clauses for convenience.

First. Its first clause is as follows:

> "The Choctaws and Chickasaws in consideration of the sum of $300,000 hereby cede to the United States the territory west of the 98th degree of west longitude, known as the leased district."

(a.) There is no uncertainty as to the parties—they are the Choctaws and Chickasaws on the one part and the United States on the other.

(b.) The consideration is definite. It is for the sum of $300,000.

(c.) The granting word is certain. They "cede," a word universally used by the United States in its treaties with Indians and foreign nations in acts of cession, and needs no interpretation, and is capable of but one meaning.

(d.) The territory ceded is not in doubt; it is the territory west of the 98th degree of west longitude known as the leased district. No ambiguity therefore arises from the first clause.

Second. The second clause is:

> "Provided that the said sum shall be invested and held by the United States at an interest not less than five per cent in trust for the said nations."

Even an "unlettered" Choctaw could have no doubt as to what is meant by these words; they are capable of but one meaning.

Third. The third clause explains the conditions upon which the said sum of $300,000 shall be held in trust by the United States, and for how long. It says:

> "Until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively."

If there is any ambiguity in this clause we would be glad to have the learned counsel indicate where it is vague. The words are clear and are not to be twisted by any ingenuity into any double meaning.

Fourth. The fourth clause is:

> "And also to give such persons who are residents and their descendants forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided."

Nobody can be in doubt as to what is meant by these words.

Fifth—

> "And immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent, before referred to, as within ninety days before the passage of such laws, rules, and regulations shall elect to move and actually remove from the said nations, respectively."

If there is any uncertainty about the exact meaning of this clause, it has not been pointed out.

Sixth. The sixth clause is:

> "And should the said laws, rules, and regulations not be made by the legislatures of said nations respectively within two years from the ratification of this treaty, then the said sum of $300,000 shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem

> proper, the United States agreeing within 90 days from the expiration of said two years to remove from said nations all such persons of African descent as may be willing to remove."

Surely it can not be claimed that this clause presents such vagueness as to drive the court in dismay to seek for light outside of the words of the treaty. It very distinctly says that the $300,000 is on certain conditions to cease to be held in trust for the nations, and excludes the idea of a trust in the lands.

Seventh. The seventh clause is—

> "Those remaining or returning after having been removed from said nations to have no benefit of said sum of $300,000 or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nation."

Can anything be more clear, definite, and certain than the meaning of this last clause of Article III? If, as the claimants assert, this article of the treaty is ambiguous, it is incumbent upon them to point out the words, phrase, clause, sentence, and paragraph in which the ambiguity is located. The court is entitled to this, and the defendants are entitled to some sort of certainty of statement on the part of counsel for the claimants. Wherein the language of the treaty of 1866 is not clear, definite, and unequivocal the brief of neither of the many able counsel of the claimants discloses, and an analysis of the treaty, it seems, demonstrates that there is not lurking anywhere in the language of the treaty itself any such double meaning as would give this court the right to ask for extrinsic aids in its interpretation if it so wished.

It is claimed by all the counsel for the nations that in

the interpretation of the treaty of 1866 we are to observe the rule said to be established by the Supreme Court, that treaties between the United States and Indian nations are to be liberally construed in favor of the Indians, and they quote the decision of the United States Supreme Court in the famous case of Worcester vs. Georgia, 6 Peters, 515, and the Court of Claims says:

> "Chief Justice Marshall, delivering the opinion of the court, said:
>
> "The *language used* in *treaties with* the Indians should never be considered to their prejudice. If words are made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used only in the latter sense. To contend that the word allotal, with reference to the land granted to the Indians in certain treaties, indicates a bounty conferred rather than a right acknowledged, would, it seems to me, do injustice to the understanding of the parties. How the words of the treaty were understood by these unlettered people rather than their critical meaning should form the rule of consideration."

No such dictum was announced by the Supreme Court of the United States in the case, and Chief Justice Marshall, the weight of whose great name is sought to be used in this case, never uttered any such sentences. The oft-quoted paragraph above is not found in the syllabus of the case, nor in the opinion of the court delivered by Chief Justice Marshall, and is not the opinion of the Supreme Court of the United States as set forth. It does appear, however, in the separate opinion in that case delivered by Mr. Justice McLean.

What Chief Justice Marshall and the court said is as follows:

> "Is it reasonable to suppose that the Indians, who could not write and most probably could not read, and certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out?' The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. * * * If the terms would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must be taken in the sense in which it was most obviously used."

There is nothing in the opinion of the court in Worcester vs. State which justifies the inference that the court there laid down the rule that in the consideration of Indian treaties, where the *language of the treaty was incapable of doubt*, that recourse must be had to that vague, indefinite, and misleading guide as to how the unlettered nation considered the treaty.

The language of the treaty of 1866, whether liberally or narrowly construed, presents no ambiguity. The words are capable of but one meaning, and that they bear upon their face, and the unlettered Indians understood that meaning well enough when they accepted the $300,000, and understood it well enough when years afterward they declared that they had been forced to sell their lands.

It is submitted that the case of Worcester vs. The State lays down the rule "that the *language* of Indian treaties should not be construed to the prejudice of the Indians; that as a *rule of construction* of such treaties the meaning of words should be liberal and not critical and technical."

But the language of the treaty of 1866, however so liberally construed, can not make cede mean cede in trust.

The counsel for the claimants seek to give the case of

Worcester vs. The State a much broader scope than simply a rule of treaty *construction;* they transform it to *rule* of treaty *revision* and *reformation*, to be exercised by the judiciary upon grounds of so-called high morality, thus usurping the treaty-making power.

c. *The treaty of cession of 1866 being thus clear and explicit in all its terms and containing no ambiguity, this Court must interpret it from its own language and not look aliunde.*

The distinguished counsel for the claimant nations have calmly assumed that the cession of 1866 was not to be construed from its words, but that the Court must of necessity look at everything before and after the treaty to aid in its explanation. This we deny. We insist that the law declares that when a document, a statute, a treaty or any writing is in its terms clear, distinct, unequivocal, and unambiguous the Court has no right to depart from the plain meaning of the language used and seek for delusive guides elsewhere.

The language of the treaty of cession admits of but one meaning, to wit:

A cession, sale, or grant by the Choctaws and Chickasaws of their remainder over, such as it was, to the territory in question to the United States for the sum of $300,000.

Counsel for the claimants have misunderstood or misstated the true rules for the construction of statutes and treaties.

The first and cardinal rule in the interpretation of a statute or a treaty is to look at the statute or treaty itself, its meaning, its scope, and its object, and if upon its face can be seen the intention of its makers, those incidental or secondary rules which are mere aids to be invoked when the meaning is clouded are not to be regarded. It is not allowable to interpret that which has no need of interpretation.

As the courts have repeatedly said, in such a case any departure from the language used would be an unjustifiable assumption by the courts of legislative power.

U. S. vs. Fisher, 2 Cranch, 386.
Clay vs. Erhardt, 48 Fed. Rep.
U. S. vs. Hartwell, 6 Wall., 395.
U. S. vs. Weltberger, 5 Wheat., 95.
Newell vs. Replle, 7 N. Y., 97.
Encyclopaedia of Law, vol. 23, p. 298, and endless list of authorities there cited.

"Where the language is susceptible of but one meaning it must receive that meaning, although such construction leads to results which are absurd or mischievous, courts are not to tamper with the clear and unequivocal meaning of the words used, although the consequences may not be such as were contemplated by the legislature. There can be no departure from the plain meaning of a statute on the grounds of its unwisdom or of public policy."

Am. Ency. Law, vol. 23, p. 299, citing innumerable authorities.
Sedgwick on St. and Const. Law, 231.
Cooley on Const. Limitations, 107, 5th ed.

Even where the Court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language, which is free from ambiguity.

Smith vs. State, 66 Md., 215.

That which the words declare is the meaning of the instrument, and the courts have no power to add to nor take away from that meaning.

Newell vs. People, 7 N. Y., 97.
Doe vs. Consadine, 6 Wall., 458.
Koch vs. Budges, 45 Miss., 259.

In the light of these authorities it seems clear that this Court will not consider whether the consideration of $300,000 received by the claimant nations from the United States for their remote reversion in the territory in question was adequate or not. It is enough for this Court to know that the claimants took it and keep it, and that the United States paid it. Whether, in the plaintive language of one of the counsel in his brief below, the transaction was "unconscionable," or, in the rugged language of another, it was "black-hearted villany," does not matter. Courts are not created to put their own judgments as to the justice of such a transaction against the action of the legislature. Said the Court in Woodbury vs. Berry, 18 Ohio St., 462:

> "The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied by considerations outside the language that the legislature intended to enact something very different from what it did enact, but it did not carry out its intention, and we can not take the act for the deed. It is our legitimate function to interpret legislation, but not to supply its omission."

Said Lord Campbell in Coe vs. Lawrence, 1 El. & Bl., 516; 72 E. C. L., 516:

> "I can not doubt what the intention of the legislature was, but the intention has not been carried into effect by the language used. It is far better that we should abide by the words of the statute than to seek to reform it according to the supposed intention."
>
> See American Ency. Law, vol 23, p. 301, and authorities.

The question is not what the legislature meant, but what it said.

Sedg. on Construction of Statutory and Constitutional Law, p. 205.
Potter's Dwarris on Statutes, p. 146.
Am. and Eng. Ency. of Law, p. 302, and many authorities cited.

A court may not insert limitations, nor except special cases which fall within the general terms of the statute.

U. S. vs. Combs, 12 Peters, 72.
McIver vs. Ragan, 2 Wheaton, 25.
Lake Co. vs. Rollins, 130 U. S., 662.
Am. and Eng. Ency. of Law, 303, and authorities.

And words may not be imported into a statute in order that it may include a case which has been omitted merely because there seems to be no good reason why it should have been omitted and the omission appears to be unintentional.

Dwarris on Statutes, 2 ed., 579.
Denn vs. Reid, 10 Peters, 524.
Am. and Eng. Ency. of Law, p. 304, and authorities cited.

In Priestman vs. U. S., 4 Dall., 28, Chase, J., said:

> "I shall always deem it a duty to conform to the expressions of the legislature as to the letter of the statute when free from ambiguity and doubt, without indulging in speculation either upon the policy or hardship of the law."

Said Sharswood, C. J., in Dames' appeal, 62 Pa., St., 417:

> "The moment we depart from the plain words of the statute according to their ordinary and grammatical meaning in the hunt for some intention

> founded on the general policy of the law, we find ourselves in a 'sea of troubles.' Difficulties and contradictions meet us at every turn."

d. *Neither this Court nor the Court of Claims possesses the power under the Constitution to reform or correct Article III of the treaty of 1866, or any part thereof, as requested in the eighteenth paragraph of claimants' petition and in its fifth prayer and as claimed throughout all the claimants' briefs.*

Article VI of the Constitution declares the sanctity of a treaty made by the treaty-making power when it says:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all *treaties* made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

No distinction is made therein between a treaty with a foreign nation and an Indian nation or tribe, and none seems to have been made in any adjudged cases. Prior to our revolution Great Britain recognizes the Indians as nations capable of maintaining the relations of peace and war, and she made treaties with them, the obligations which she acknowledged. This policy inherited from Great Britain the United States continued from its first treaty with the Delawares in 1778 until act of Congress of March 3, 1871 section 2079, Rev. Stats., a different policy was declared. And this court, in case of Fellows vs. Blacksmith, 19th Howard, 336, answering the objection to the validity of the treaty with the Tonawanda band of Indians because the band was not represented by their chiefs and headmen in the negotiation and execution of the treaty, the court said

"But the answer to this is, that the treaty after executed and ratified by the proper authorities of the Government becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress.

As to right of suffrage under the Fourteenth Amendment the Indians have been regarded as foreigners not entitled to vote unless naturalized. Such has been the action of the political departments of the Government and the courts.

Elk vs. Wilkins, 112 U. S., 94.

The treaty of 1866 is, then, a part of the law of the land, and should be interpreted by the same rules applicable to acts of Congress.

True, by the act of March 3, 1871, now Revised Statutes, section 2079, it is provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." * * *

But the same section as clearly sanctions all former treaties made therewith by declaring that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

When the war between the States ended, the Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles found themselves in the position to forfeit their treaty rights with the United States by having aided Confederate States and were anxious to regain those rights by new treaties.

Hon. D. M. Cooley, the Commissioner of Indian Affairs, headed a commission sent by the Government to these "Five civilized tribes," whose delegates they met at Fort Smith, Arkansas, in September, 1865.

Seven proposition were insisted upon by the Government, the fifth of which was as follows:

Fifth. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government or such as may be fixed by the Government.

Nothing came of this but a treaty of peace. A draft of a treaty with the Choctaws and Chickasaws fully embodying these seven proposition was submitted by the United States to them, but was never executed. After this, in 1866, authorized delegates from the Choctaws and Chickasaws came to Washington, where they signed the treaty of cession of April 28, 1866. It is claimed with great vigor, but with no proof, that by "mistake" or "inadvertence" these seven proposition made in 1865 were not put in the treaty of 1866, and this court is asked to "reform" or "correct" the treaty of 1866 by inserting them—especially the fifth proposition. With equal logic they might ask the court to "reform" the executed treaty of 1866 by substituting the unratified one of 1865 by alleging mistake and inadvertence. They produce no evidence to show by whose mistake or inadvertence these propositions were omitted, but as the whole structure of their case is built upon the fifth proposition, they assert that this court shall add it to the treaty of 1866 by virtue of its equity power to correct in an instrument accident or mistake.

In answer to this it needs only to be said that no court in the United States has the power to "reform" or "correct" a treaty made by the President, with the advice and consent of the Senate, as provided by the Constitution.

The Supreme Court of the United States, speaking through Mr. Justice Story, in the case of "The Amiable Isabelle" (6 Wheaton, p. 1) said:

"In the first place, the court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add *to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions.* It would be to make and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and, having found that, our duty is to follow it *as far as it goes and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind.* The parties who formed this treaty, and they alone, have a right to annex the form of the passport. * * *

"In the next place this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties and, whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same parties which have contracted are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them.

> We can as little dispense with forms as with substance. * * *
>
> "We may, indeed, conjecture, but in this conjecture we may err, and to assert what it would be *in literis* would be to exercise a sovereign control over the compact itself."

Can anything be more explicit than this decision? The claimant nations seek not alone to amend the treaty of 1866, but to abrogate it.

The Supreme Court, in reviewing and approving the decision of the Court of Claims in the "Old Settlers" case, said:

> "The Court of Claims declined to go behind the treaty of 1846, upon the ground that it was not within the province of a court either of law or equity to determine that a treaty or act of Congress had been procured by duress or fraud and declare it inoperative for that reason."

Yet claimant nations ask this court to go behind the treaty of 1866 and "reform" and "correct" it, and to practically declare it inoperative on the uproven statement of "mistake" and "inadvertence," a cognate ground in equity with fraud and duress. The counsel in the rhetoric of their briefs claim that by mistake and inadvertence the fifth proposition of 1865, made at Fort Smith, was not put in the treaty of 1866, made at Washington, but the Choctaw nation, by a solemn act of their legislature passed in 1867, declare that they were forced by the United States to sell their lands by this treaty. Whether they will ask this court to frame a decree in this cause declaring the treaty of 1866 invalid and void as procured by duress, as their clients say, or to have a decree drawn "reforming" it for mistake or "inadvertence," as they say, we do not know.

> "Wise indeed was Sharswood, J., in saying when we depart from the plain words of a statute, in a hunt for some intention found elsewhere, we find ourselves in a sea of troubles. Difficulties and contradictions meet us at every turn."

Again say the Supreme Court in the "Old Settlers" case:

> "Undoubtedly a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision."

Again this court says:

> "The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto and the determination of what sum, if any, might be justly due under them certainly does not include a claim which could only be asserted by disregarding the treaties or laws or holding them inoperative on the ground alleged."

Every brief filed for the claimants seeks to demolish the treaty of 1866; indeed, the whole case of the Choctaw and Chickasaw nations is but a huge structure built upon the ruins of their solemn treaty of 1866.

Skillfully and laboriously it has been constructed, but, judged by this decision of the Supreme Court, it must fall.

Again say the Supreme Court in the "Old Settlers" case:

> "The Court of Claims was indeed to have 'unrestricted latitude in adjusting and determining the said claim so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined,' but this

> did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations or to bring supposed moral obligations into play for the disposal of the same."

But in this case supposed moral obligations are brought into play, the good faith of the Government is impugned, the adequacy of the consideration is impeached and the United States is made to figure as a tricky guardian oppressing his helpless ward.

e. *Assuming the Court will permit any inquiry as to the validity of the treaty of 1866 or the adequacy of the consideration the Choctaw and Chickasaw nations ought to be and are equitably estopped against the United States and the Wichitas and affiliates because they accepted and still retain the consideration and are further estopped by conduct.*

On page 264 of the record will be found the dates and the amounts of the payments of the $300,000 to the Choctaw and Chickasaw nations.

The Choctaws have received all of their share of $225,000, and the Chickasaws a larger part of their $75,000, all except $17,375; but as they have not yet passed the necessary laws for their freedmen they are not entitled to that they have received, and stand in the singular position of refusing in defiance to carry out some provisions of their treaty with the Government, and yet asserting their claims under it. The Choctaws took their share, keep it, make no offer to refund, and yet claim ownership in what they have sold.

The two nations have received from the United States, under the treaties of 1855 and 1866, for perpetual lease and sale of their equity about one million one hundred thousand dollars, and without offering to return a dollar, assert

their right to the proceeds of the entire tract, and by their cross-appeal in this court seek to oust the Wichitas and their affiliates from any part or parcel of the land. Even the Court of Claims revolted at this and by their decree allowed the Wichitas and affiliates 160 acres of land each. The two nations seek to attain this injustice to the United States and to the Indian bands under a claim that by rules of equity the treaty of 1866 can be reformed by this court on account of mistake and inadvertence.

In connection herewith we may refer to the Act of the Choctaw legislature instructing its national attorney, in connection with this treaty, approved November 20, 1867.

> An act entitled an act to authorize the national attorney to attend to the claims set up against the nation under 49th and 50th articles of the treaty of April 28, 1863, and for other purposes.
>
> Sec. 1. *Be it enacted by the General Council of the Choctaw Nation assembled*, That the present national attorney be, and he is hereby, required to proceed to Washington city as soon as possible, and appear before his honor the Secretary of the Interior, and file such arguments as he may deem essential to make touching the origin and present of the claims awarded by Messrs. Rice and Jackson under the 49th and 50th articles of the treaty of April 28, 1866, and insist upon the importance of having a new commission raised to investigate the said claims, in order to enable this nation to introduce rebutting testimony.
>
> Sec. 2. *Be it further enacted*, That if in the opinion of the said Secretary of the Interior, that a new commission to investigate the claims aforesaid can not be ordered without the action of Congress, or by consent of parties to the case, then, in that event, the national attorney shall exercise his best judgment and discretion in the premises, and report the facts to the Principal Chief.

Sec. 3. *Be it further enacted*, That the national attorney be, and he is hereby, instructed to respectfully bring to the notice of the Commissioner of Indian Affairs of Washington city, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the 3d article of the treaty of April 28, 1866, *when they have submit humbly to the forced sale of the "leased district" lying west of 98th degree west longitude, for about two and a half cents per acre*, for objects of negro colonization upon their borders; and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed.

Sec. 4. *Be it further enacted*, That said attorney shall use his best endeavors to delay and defer the territorial organization contemplated under article 8 of the treaty of April 28, 1866, until such time as the several nations composing the Indian country shall become more friendly and more disposed to unite and come under one head, or, in other words, under one form of government, to be controlled by the Congress of the United States, and shall have become more qualified to take good care of their landed interest, than the present state of feeling seems to exist between the citizens of each nation in regard to the whole policy of coming under a territorial government—the Government at Washington must understand that the habits and customs of Indian nations can not be easily changed, whether for weal or woe, without their consent.

Sec. 5. *Be it further enacted*, That, in order to provide against contingencies that might occur during the prosecution of the duties herein required of the national attorney, there shall be elected by joint ballot of both houses of the present session of the General Council, an assistant attorney,

whose duty shall be to aid and assist the principal attorney in all matters touching the interest and welfare of this nation, especially the claim set up by "loyal Indians" under 49th and 50th articles of said treaty, and whose terms of service shall expire with the adjustment of all the claims herein specified, and who shall act as principal attorney when so required by the principal national attorney —it is agreed and understood by this act that the nation will only defray actual expenses of traveling, and other incidental expenses to and from Washington city, for each of the attorneys mentioned in this act, at three dollars per day each and expenses paid, and hereby agree to give them one-half of the amount that they may recover or save for the nation upon the claims arising under 49th and 50th articles of the treaty of April 28, 1866, other than the "net proceeds question;" and it is also understood that should they employ claim agent or counsel to answer for them in any given case, it shall be done at their own expense and responsibility.

Sec. 6. *Be it further enacted*, That a correct statement of all the acts, proceedings, accounts, and correspondences had upon the business herein intrusted to the national attorney, shall be kept by his assistant and who shall make his report upon the same to the Principal Chief of this nation.

Sec. 7. *Be it further enacted*, That the Principal Chief is hereby requested to authenticate the credentials of each of the national attorneys herein mentioned to the Commissioner of Indian Affairs at Washington city.

Sec. 8. *Be it further enacted*, That this act take effect, and be in force from and after its passage.

Repassed the Senate by two-thirds vote.

November 20, 1867.

Repassed the House of Representatives by two-thirds vote.

November 20, 1867.

(Constitution and Laws of the Choctaw Nation,

New York, 1869, p. 478 *et seq.* Defendant Indians' Evidence Ex. 24.)

After this solemn act of this claimant nation's legislature, they accepted $52,125 more, being the full sum due them, with interest, for the residue of their share of the $300,000.

They call it a sale, a forced sale, but they accept and keep the consideration, and without offering to return it, with interest, ask that the United States pay them again.

We assert that they are estopped from this claim.

This case is to decide the rights, legal and equitable, of the parties, which means that those rights are to be determined by the rules of law and equity.

Their counsel appeal to equity for the reformation of the treaty of 1866, for equity rules declaring that the cession of 1866 was not absolute, but in trust.

We, too, invoke in our behalf some other rules of equity —the doctrine of estoppel by record, estoppel by taking benefits, estoppel by conduct, estoppel by an election between inconsistent positions, and estoppel by acquiescence.

They say their case is based upon an appeal to what is termed higher reason. What limit "higher reason" may have no one has ascertained or can. We claim that the rules of established law and equity govern the determination of this cause.

When we seek to know what justice is, we must find it in the judgments of courts of law and equity. We beg to quote Ferguson vs. Landman, 1 Bush., 548. This was a case in which in 1864 the people of Gallatin County, Kentucky, met and resolved to raise $20,000 as a fund to draft soldiers for the Union cause. They appointed a committee to get an act of the legislature authorizing the county to issue bonds for this amount and to levy a tax to

pay the money. It was done and the volunteers were obtained. Certain parties who aided in getting the act passed afterwards sought by injunction to restrain the collection of the tax. In its decision refusing the injunction the court said:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him or from which he receives an interest or a consideration, and then keep the consideration and repudiate the statute as unconstitutional?"

To this extreme courts of equity have applied the doctrine of estoppel.

See Bigelow on Estoppel, p. 652, and cases cited in note 4.

The claimants in 1866 had the right to refuse to receive the consideration they elected to take and are estopped.

Bigelow on Estoppel, p. 651, and authorities cited.

Their long acquiescence in the sale of these lands, by twenty-four years of silence, should bar them.

Bigelow on Estoppel, p. 597.

It can not be *justly* claimed that the Choctaw and Chickasaw nations, claimants, were in 1866 not *sui juris* and subject to all the laws of equity, a part of which they now invoke as not applicable to them.

This court in trying and determining this case must meet the question as to the exact status of the claimants when they signed the treaty of 1866, by which on its face they sold their remote reversion to these lands in question for $300,000 to the United States. If that treaty is as a deed between persons where one has paid the price agreed and the other has received and retained it without protest

for at least twenty-four years, the principles of equitable estoppel put these claimants out of court. If the law of estoppel is not applicable to them it must be on the theory that they have the immunity supposed to be granted to infants and *femmes covert* when nothing is supposed to bind. Certainly they can ask for nothing more of privilege in equity than this; but even infants and *femmes covert* are bound by the receipt of the proceeds of the sale of their property and the retention of the proceeds. Estoppel binds them.

But, admitting that the Supreme Court of the United States declared in the case of Worcester vs. The State that the language of Indian treaties should not be construed to their prejudice, and that a later decision of the same high court said they were the "wards of the nation," and that another decision declared that in dealing with them the United States stood in the position of a superior to an inferior, to what conclusion do these authorities lead? If they mean what the claimants' counsel boldly proclaim, that in Indian treaties made by the treaty-making power of the United States as granted by the Constitution the adequacy of the consideration and the moral and political reasons inducing the treaty-making power of the Government in executing them shall be reviewed and annulled in whole or in part by new conditions annexed by the judiciary, we are at once confronted with a conflict between the legislative, executive, and judicial branches of our Government, to the dismay of the court attempting such usurpation and to the ultimate absorption by the judiciary of the powers and functions of the national executive and legislature.

What, then, was the status of the claimant nations in 1866?

Were they helpless creatures, tribes, or nations?

They called themselves nations then and are nations now.

It is true they were "dependent and domestic nations," in the language of the Supreme Court.

But they themselves declared themselves independent nations, and united with the Confederate States as such in treaties of alliance, and furnished aid and comfort to the enemies of this Republic. They sent regiments of troops to sustain what was either a rebellion or a war between the States. By those acts *per se* their treaties were annulled. Congress gave the President of the United States power to declare them so, but it was never exercised by him. When that great war ended they made, in 1865, a general treaty of peace. If they were, as we may say, *sui juris* to make that treaty they were *sui juris* to make the treaty of a year later. If they had power to make a treaty of peace one year they had power to make a treaty of cession a year afterwards, and it seems to us that to declare that a nation that in 1861 could declare its independence and make war against this Government was in 1865 and 1866 entitled to plead that it was "unlettered" and crave judicial mercy on that ground, is an insult to common sense.

If they were "lettered" enough to make their nation's treaty with the Confederate States in 1861 they were "lettered" enough to make one with the United States in 1866. Their relations in 1866 to this Government were in all respects changed from that of the poor Cherokees in 1842. They were not in any sense wards of this nation in 1866; they had made themselves "wards" of the Confederacy, and the Confederacy had fallen.

Their newly chosen guardian died at Appomattox. The United States therefore, in 1866, stood absolved from any laws governing its treatment of them, except such as a conqueror chooses to use over the conquered, judged by the

standard of right of that day.

The United States had a perfect right by power to say to them: The lands you leased to us for $800,000 by your releasing the same to the Confederacy are now forfeited forever and are ours. It had the power and the right to visit them with severe restrictions in keeping with their offense. The United States with its grand amnesty embraced them in a treaty of peace. In 1866 it made with them as a nation the generous treaty in dispute.

For this court in 1898 to declare that either the consideration was inadequate or the terms unjust is for this court to usurp the powers of the Government and to condemn its action.

We say these claimant nations are estopped by that treaty as much as France is by the treaty by which she ceded Louisiana, Spain Florida, and Mexico California. If one can be torn asunder by the courts, so can all.

If the laws of estoppel do not, as a matter of right, apply to a "domestic dependent" nation, they do not to a foreign independent nation.

If it is claimed, as doubtless it will be (since everything in this case is claimed and nothing proven), that the doctrine of estoppel is a "technical rule" not to be invoked in such a case as this, but rules of "higher reason" must guide, we beg leave for a reference to some authority outside the counsel, so we may learn this lofty jurisprudence. It seems to us that even in the mystical mid-region of higher ethics it must be admitted, as a rule of morality, that if A sells his lands to B for $300,000 and keeps the price, as long as he does, he is estopped from asserting his rights until he pays it back.

We can not refer to decisions as to estoppel between nations, since, for a violated treaty between them, there is no appeal save by war or arbitration, and we therefore

plead no estoppel by judgment or record, since there could be no place of record of judgment.

Nations in their dealings are only in honor bound. The treaty is but a deed. We quote these decisions as of the "highest reason" we know as illustrative of our contention.

A party to his contract can not pronounce its own deed invalid although that party be a sovereign State.

Fletcher vs. Peck, 6 Cranch, 87.

Where a grantor acknowledges the receipt of a sum as consideration he is estopped from denying it.

Lawrence vs. McCalmont, 2 How., 426.

Where a doubtful land claim has been confirmed by Congress on certain terms and the claimant has accepted those terms and taken the benefit, he can not come into court and enforce his entire claim as if no adjustment had been made.

United States vs. Roselius, 15 How., 31.

Where a county received in exchange for its bonds a certificate of stock of a railroad company and held it seventeen years and still holds it, it is estopped from asserting that the conditions on which the bonds were to be issued had not been fulfilled.

Pendleton Co. vs. Amy, 13 Wall., 297.
Savannah vs. Kelly, 108 U. S., 184.
Daniels vs. Turnay, 102 U. S., 415.
Storm vs. U. S., 94 U. S., 76.

It may be asserted that the doctrine of estoppel does not apply to Indian nations in making treaties and in dealing with the United States because they are "unlettered." If so, no Indian treaty can ever have a settled validity; no cession can ever be consummated. All their sales will be

"Indian gifts," to be taken back whenever they please. We insist that the ordinary rules of equity can not thus be demolished. There must be an end somewhere to the extraordinary latitude claimed for them. They elected in 1866-1867 to accept the consideration. It is too late now to refuse to abide the consequences. This court is to *try* and *determine* a cause, not *ex gratia* to make a gift to them.

f. Admitting that the United States by settling in severalty upon the defendant Indians the lands ceded to it by the treaty of 1866 as varied and construed by the treaty of 1855, no pecuniary loss is sustained by the nations.

The position of the claimant nations is that the treaty of 1866, construed with that of 1855 and by all the circumstances environing both treaties, and considered from the relationship of the United States towards the Indians, as gathered from history—legislative, executive, and judicial—makes the United States a holder of the lands in question as a sort of trustee, and that when the United States by the act of 1895 violates its duties as such trustee, the claimants become entitled to the whole title, legal and equitable, of the lands in question. Concede this, the whole case of the claimants, and we deny that their conclusions are legally drawn. Granted that the United States, by the whole case of the claimants, as stated by them, became a trustee to hold the lands for the permanent settlement of the defendant Indians and other Indians, and that as such trustee the United States breaks the trust, what pecuniary damage comes to the claimants, if any? We say that they are so imponderable that this court has no scales in which to weigh it. Their injury is nothing, estimated in any legal manner. If the treaty of 1855 leased the whole territory and that of 1866 did the same, if the United States now breaks the treaties, what is the injury to the claimants and

in what forum can they seek redress? We concede in this part of our argument that by the legal effect of the treaty of 1855 and 1866 the claimants relinquished to the United States all their title to the lands in question on the condition that the United States, as trustee, should use them for the "permanent settlement of friendly Indians on them."

We concede that the United States seeks to break the treaty by settling the Wichitas and their affiliates on the lands in question and by selling the rest of the lands. Here, then, by their claim, is a trustee who maladministers his trust by not using the trust fund in part for the beneficiary, the friendly Indians, but seeks to use a part of the trust estate in another way. What, then, is the damage to the claimants? What is their legal injury? How are the claimants harmed, and how much in money? We say that if the lands were given by the claimants for our use, we alone are the ones who are injured if the trustee fails to fulfill his trust, and we alone have the right to ask for remuneration; but we are content. We, as the beneficiaries under the trust, say that we consent to the disposition made by the trustee. By what right do the claimants, as against us, say that they are injured?

Are they the beneficiaries under the trust deed or are we?

If the United States fulfill the trust and permit us to remain on the lands, are they injured?

If the United States permit us to be permanently settled on a part of the lands, we consenting, are they injured pecuniarily, and, if so, how much, and where, and how estimated? Whom will they sue, and where, and for how much?

The ultimate conclusion of the claimants' case is that they ask for a return of the value of the lands in issue because the United States gives them to us on a different

holding, one in severalty in lieu of a tribal holding; but, no matter how we hold, how are they hurt?

They took the money and the United States took the land for our benefit, and it is a question solely between the United States and us how the lands or their proceeds are used.

Admitting that the United States violates the condition of the treaty of 1866, how are the claimants injured? We still remain permanently settled on the lands, or a part thereof, and the residue are to be occupied by others. How are the claimants harmed in purse, and what special damage do they allege and prove? None; none whatever. They claim that Congress by the act of 1895 gave this court the right to award damages to them for a violated treaty. We deny their claim and assert that there is no forum in which such damages can be estimated.

For a broken treaty between two nations there is no appeal, except to arms or arbitration.

If the cession of 1866 is as a treaty between nations, the Congress had no right to refer the question of damages under it to this court. The power that made the treaty is alone the power to judge of the penalty for its infraction, and that power in this case still remains where the Constitution reposed it.

If the treaty of 1866 and its annexed conditions are broken and disregarded by the United States, the amount of damages for it are not to be estimated by this court. It is and must remain a mater for an appeal by the claimants to the United States. The act giving this court jurisdiction does not confer upon it the power to settle the amount of damages due for a violated treaty. If it does, it is unconstitutional and void to that extent.

Suppose this court should arrive at the conclusion that the claimants were entitled to the value of the lands they

ceded, and also for damages from the United States for its violation of the treaty or contract of 1866, this court at once assumes the right to add conditions to a treaty and usurps the treaty-making power.

To decide the amount of such damages this court would be forced to consider the moral and political reasons impelling the treaty, and to wander through the province of the treaty-making powers.

This the Constitution forbids and the decided law denies.

In the case of Chai Chan Ping vs. The United States, 130 U. S., 69; Lowery's ed., 1074, the Supreme Court of the United States said:

> "The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *
>
> "This court is not a censor of the morals of other departments of the Government. It is not vested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses power to pass an act, our province ends with its construction. * * * The province of the court is to pass upon the validity of laws, not to make them, and, when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain."

What the claimants ask is for this court not only to censure the morality of the United States in making the treaties of 1855 and 1866, but to impeach the validity of the latter and by its decree to revest in the Choctaw and Chickasaw nations the title to the lands that they ceded by treaty to the United States. It would be interesting as a piece of curious legal ingenuity to examine the decree that the claimants ask this court to sign and contrast it with the contract, treaty, deed, and agreement of 1866. If this

court is to decree damages against the United States for its alleged violation of its agreement from 1855 to 1866 with the claimants, where, may we ask, does the power of the judiciary end as to the acts of the treaty-making powers?

As this court has before decided that it had no power to annul a treaty as procured by duress or fraud, so we claim it has no power to award damages as of tort because the United States has broken a treaty, if such were the case.

g. *If, as claimant nations contend, the seven propositions made to the Indians in 1865 were by mistake or inadvertence omitted from the treaty of 1866, the burden of proof is on them to sustain this by evidence, which they have not done.*

Unless this case is, as a sort of "hotchpotch" of law and equity, the usual orderly rules of evidence must be applied to it. The treaty of 1866 being on its face a clear cession of all rights by the claimants, as we assert, and attacked by them on the grounds of "mistake" and "inadvertence," they must prove by testimony the omissions in the treaty upon which they rely. The real issue is between the "unletterd nations" as claimants and the "unlettered tribes" as defendants, the United States standing as a mere stakeholder. The uncultured defendants stand on the treaty of 1866, and entrenched within its plain provisions await the attack of their unread opponents. Against us they marshal several hundred pages of printed arguments, but not one paragraph of proof from the lips of any witness, living or dead, is offered to sustain, or is put by them into the record to sustain, their contention.

None of the delegates who for them signed the treaty have testified, if living. If dead, none of their declarations have been proven; nothing is here from the learned counsel who carefully guarded their rights in 1866, employed for that purpose by them. By whose "mistake" or "inadvert-

ence" in 1866 the conditions upon which they now stand were omitted they neither allege nor attempt to prove. The burden being upon them, they utterly fail in proof and give no reason for their failure. They ask this court arbitrarily to insert conditions in that treaty by presumption and conjecture. It seems to the defendants beyond doubt that if in 1865 propositions were made to the Indians, and that the treaty of 1866 did not contain them, the only legal conclusion that can arise is that they were purposely omitted by consent of both parties.

This conclusive legal presumption needs no vindication, but the proof on our behalf shows that as a matter of fact the claimants positively scorned in 1865 the propositions they now say were "inadvertently omitted" in 1866. The stone rejected by the builders of the treaty of 1866 has now become the cornerstone of their new edifice.

Even if this court had the power to supply a "casus omissus" in a treaty, the proof shows conclusively that there was no such omission. After solemnly executing a treaty by commissioners and ratification by the legislatures of the Choctaw and Chickasaw nations, after taking and keeping the benefits under the treaty, after an acquiescence therein for nearly a quarter of a century, a "casus omissus" appearing on the stage thus late comes in such a questionable shape as to deserve no recognition.

h. *We deny that the act of Congress of March 3, 1891, appropriating $2,991,400 to pay the Choctaw and Chickasaw nations for their supposed interest in the part of the "leased district" set apart by the Government for the use of the Cheyenne and Arapahoe Indians by a treaty of 1866, said lands so paid for by the Government being a part of the territory in dispute in this cause, is binding on this Court as being in pari materia with the cession of 1866.*

We concede that the act of Congress of March 3, 1891, said that the part of the "leased district" occupied by the Cheyenne and Arapahoe Indians *"have been ceded in trust by Article III of the treaty"* of 1866, and that the Choctaw and Chickasaw nations extracted from the Treasury of the United States by this act the above sum for their supposed interest therein remote and groundless, as we assert such interest to have been. It may not be amiss to state of that bill that in the closing hours of the session of the Fifty-first Congress by legislative legerdemain it was shuffled in the general appropriation bill, and turned up as a winning card. Because of that fact President Harrison signed it under protest as to its justice.

And in submitting the whole matter embraced in the clause of Indian appropriation act of March 3, 1891, the President of the United States transmitted to the Senate and House of Representatives on the 17th of February, 1892, the following message, which we ask to be made a part of this brief:

To the Senate and House of Representatives:

The Indian appropriation bill, which was approved March 3, 1891, contains the following provision:

> "And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by article three of the treaty between the United States and said

Choctaw and Chickasaw nations of Indians, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and conveyances to the United States of all the right, title, and interest, and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute), in manner and form satisfactory to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours a disapproval of the general Indian appropriation bill of which it was a part would have resulted in consequences so far-reaching and disastrous that I felt it

my duty to approve the bill. But as a duty was devolved upon me by the section quoted, viz.: the acceptance and approval of the conveyances provided for, I have felt bound to look into the whole matter, and in view of the facts which I shall presently mention, to postpone any executive action until these facts could be submitted to Congress.

Very soon after the passage of the law it came to my knowledge that the Choctaw legislature had entered into an agreement with three citizens of that tribe to pay to them as compensation for procuring this legislation 25 per cent of any appropriation that might be made by Congress. The amount to be secured by these three agents, under this agreement, out of the three-fourths interest in the appropriation of the Choctaw Nation, is $560,896. I have information that a contract was made by the Chickasaws to pay about 10 per cent of their one-fourth interest to the agents and attorneys who represented them.

Within a month after the passage of the law, R. J. Ward, one of the agents who was to divide with his two associates the enormous sum to be paid by the Choctaws, presented to me an affidavit dated April 4, 1891, which is herewith submitted. It appears from his statement that the action of the Choctaw council in this matter was corruptly influenced by the execution of certain notes signed by Ward for himself and his associates in sums varying from $2,500 to $15,000. His associates deny any knowledge of this, but the giving and existence of these notes is not refuted. The statement of the two associates of Ward, denying any knowledge of or participation in this fraud are also submitted, together with other papers relating to the matter. Whatever may be the fact as to the use or non-use of corrupt methods to secure this legislation from the Choctaw council, I do not think the Congress of the United States should so legislate upon this matter as to give effect to such a contract, which I am sure

must have been unnoticed when the measure was pending. If the relations of these Indians to the United States are those of a ward, Congress should protect them from such extortionate exactions. We can not assume that the expenses and services of a committee of three persons to represent this claim before Congress could justly assume such proportions. The making of such a contract seems to convey implications which, I am sure, are wholly unjust.

After the passage of the appropriation bill, legislation was had by the Choctaw Nation looking to the completion of the contract made with their delegates as to the payment of this money, but subsequently, when it was supposed that this extraordinary arrangement might require me to bring the matter to the attention of Congress, an act was passed by the Choctaw general council, approved October 19, 1891, declaring all contracts made by the Choctaw delegates with any attorneys in connection with this appropriation void and of no effect. A copy of this law will be found with the papers submitted. There has also been submitted to me an unofficial copy of the opinion of the attorney-general of the Choctaw Nation holding that this last legislation is unconstitutional and void. I am of the opinion that, if this appropriation is to stand, provision should be made for protecting these tribes against extortionate claims for compensation in procuring action by Congress.

Copies of the several laws passed by the Choctaw Nation with reference to this matter will be found in the accompanying papers. It will be noticed that the distribution proposed is limited to Choctaws by blood, excluding the freedmen and the white men who have been given full citizenship from any participation. A protest against this method of distribution has been filed by a white citizen of the tribe, and also a representation by Hon. Thomas C. Fletcher, their attorney, on behalf of the freedmen.

In view of the fact that the stipulations of the treaty of 1866, in behalf of the freedmen of these tribes, have not, especially in the case of the Chickasaws, been complied with, it would seem that the United States should, in a distribution of this money, have made suitable provision in their behalf. The Chickasaws have steadfastly refused to admit the freedmen to citizenship as they stipulated to do in the treaty referred to, and their condition in that tribe, and in a lesser degree in the other, strongly calls for the protective intervention of Congress.

After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill, already set out, "ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866," etc. It is agreed that that treaty contained no express limitation upon the uses to which the United States might put the territory known as the leased district. The lands were ceded by terms sufficiently comprehensive to have passed the full title of the Indians. The limitation upon the use to which the Government might put them is sought to be found in a provision of the treaty by which the United States undertook to exclude white settlers, and in the expressions found in the treaties made at the same time with the Creeks and other tribes of the purpose of the United States to use the lands ceded by those tribes for the settlement of friendly Indians.

The stipulations as to the exclusion of white settlers might well have reference solely to the national lands retained by the Choctaw and Chickasaw tribes, and the reason for the non-incorporation in the treaty with them of a statement of the purpose of the Government in connection with the use of the lands is well accounted for by the fact that as

to these lands the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the lands of the other tribes referred to. The United States paid to the Choctaws and Chickasaws $300,000, and the failure to insert the words that are called words of limitation in this treaty points, I think, clearly to the conclusion that the commissioners on the part of the Government, and the Indians themselves, must have understood that this Government was acquiring some thing more than a mere right to settle friendly Indians, which is already possessed, and something more than the mere release of the right which the Choctaws and Chickasaws had under the treaty of 1855 to select locations on these lands if they chose.

Undoubtedly it was the policy of this Government for the time to hold these and the adjacent lands as Indian country, and many of the expressions in the proclamations of my predecessors and in the reports of the Indian Bureau and of the Secretary of the Interior mean this and nothing more. This is quite different from a conditional title which limits the grant to a particular use and works a reinvestment of full title in the Indian grantors when that use ceases. But those who hold most strictly that a use for Indian purposes, where it is expressed, is a limitation of title seem to agree that the United States might pass a fee absolute to other Indian tribes in the lands ceded for their occupancy. Certainly it was not intended that in settling friendly Indians upon these lands the Government was to be restrained in its policy of allotment and individual ownership. If, for an adequate consideration by treaty, the United States placed upon these lands other Indian tribes, it was competent to give them patents in fee for a certain and agreed reservation. This being so, when the policy of allotment is put into force the compensation for the unused lands should certainly go to the occupying tribe, which,

in the case supposed had paid a full consideration for the whole reservation.

It will hardly be contended that in such case this Government should pay twice for the lands. In the appropriation under discussion this principle is in part recognized, for no claim is made by the Choctaws and Chickasaws for the lands allotted to the Cheyennes and Arapahoes. The claim is for unallotted or surplus lands. The case of the Cheyennes and Arapahoes is this: In consideration of other lands the Government gave them a treaty reservation in the Cherokee Outlet, but never perfected it by paying the Cherokees the stipulated price and placing these Indians upon it. The Cheyennes and Arapahoes declined to go upon the strip and located themselves further south, where they now are. The Government subsequently recognized their right to remain there and set apart the lands now being allotted to members of that tribe, and the lands for which payment is now claimed by the Choctaws and Chickasaws, as the Cheyenne and Arapahoe Reservation. I think the United States must be held to have assented to the substitution of these lands for the treaty lands in the Cherokee Strip, and that being true when the reservation is broken up, as now, by allotments, it would seem that the Cheyennes and Arapahoes were entitled to be compensated for these surplus lands. In fact, a commission which has been dealing with the tribes in the Indian Territory has concluded an arrangement with them by which the Government pays $1,500,000 for these surplus lands and for the release of any claim to the Cherokee Strip, so that, in fact, in this agreement with the Cheyennes and Arapahoes, the Government has paid for the lands for which payment is now claimed by the Choctaws and Chickasaws.

It should not be forgotten, also, that the allotment to the Cheyennes and Arapahoes is still incomplete. The method of calculation which resulted in

stating the claim of the Choctaws and Chickasaws at $2,991,450 is explained by a letter of Mr. J. S. Standley, one of the Choctaw delegates, dated April 6, 1891. The agent for the Cheyennes and Arapahoes wrote Mr. Standley that there were 600 Indians residing upon the lands south of the Canadian River, and who it was supposed would take allotments there, and upon this statement the legislation was based. Now, it must be borne in mind that the Cheyennes and Arapahoes have the right to locate anywhere within their reservation, and that instead of 600, double that number might have taken their allotments south of the Canadian River upon these lands. This is not probable, but a later report indicates that the number will certainly be in excess of 600. If the sum to be paid to the Choctaws and Chickasaws depended upon a knowledge of the number of acres of unalloted land south of the Canadian River, it would seem to have been reasonable that the appropriation should have been delayed until the exact number of acres taken for allotment had been officially ascertained. This has not yet been done.

It is right also, I think, that Congress in dealing with this matter should have the whole question before it; for the declaration of Indian title contained in this item of appropriation extends to a very large body of land and will involve very large future appropriations. The Choctaw and Chickasaw leased district, embracing the lands in the Indian Territory between the ninety-eighth and one hundredth degrees of west longitude and extending north and south from the main Canadian River to the Red River, including Greer County, contains, according to the public surveys, 7,713,239 acres, or, excluding Greer County, 6,201,663 acres. This leased district is occupied as follows: Greer County, by white citizens of Texas, 1,511,576 acres. The United States is now prosecuting a case in the courts to obtain a judicial declaration that this county is

part of the Indian country. If a decision should be rendered in its favor, the claim of the Choctaws and Chickasaws to be paid for these lands at the rate named in this appropriation would at once be presented.

The Wichita Reservation is also upon the leased lands and is occupied by the Wichitas, Caddoes, Delawares, and remnants of other tribes, by Department orders made to depend upon the treaty with the Delawares in 1866 and some other unratified agreements with tribes or fragments of tribes in 1872. This reservation contains 743,610 acres.

The Kiowa, Comanche, and Apache Reservation is occupied by those Indians under a treaty proclaimed August 25, 1868, which provides that said district of country "shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the tribes herein named, and for such friendly tribes or individual Indians as from time to time they may be willing (with the consent of the United States) to admit among them." This reservation contains 2,968,893 acres.

The Cheyennes and Arapahoes, whose surplus lands are to be paid for by this appropriation, have occupied the country between the Washita and Canadian rivers extending west to the one hundredth degree of longitude. This reservation contains 2,489,160 acres.

I have stated these facts in order that it may be seen what further appropriations are involved in a settlement for all these lands upon the basis which Congress has adopted. It does not seem to me to be a wise policy to deal with this question piecemeal. It would have been better if a remnant of title remains in the Choctaws and Chickasaws to the lands in the leased district, to have settled the whole matter at once. Under the treaty of 1855 the Choctaws and Chickasaws quitclaimed any supposed interest of theirs in the lands west of the one hundredth degree. The boundary between the Louisiana pur-

chase and the Spanish possessions by our treaty of 1819 with Spain was, as to these lands, fixed upon the one hundredth degree of west longitude.

Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas and not of the United States. The lands became public lands of that State. For the release of this claim and for the lease of the lands west of the ninety-eighth degree the Government of the United States paid the sum of $800,000. In the calculations which have been made to arrive at the basis of the appropriation under discussion, no part of this sum is treated as having been paid for the lease. I do not think that is just to the United States. It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. The sum of $300,000, paid under the treaty of 1866, is deducted, as I understand, in arriving at the sum appropriated. It seems to me that a considerable proportion of the sum of $800,000 previously paid should have been deducted in the same manner.

I have felt it to be my duty to bring these matters to the attention of Congress for such action as may be thought advisable.

BENJ. HARRISON.

Executive Mansion, February 17, 1892.

So we deny that it is an act *in pari materia* with the treaty of 1866 and binding on this court in this case.

If this act of the Fifty-first Congress stood alone there

might be some force in the claim of counsel, but the following Congress—the Fifty-second—passed a joint resolution, which became equally a law, correcting an error of $48,000 in figuring the sum said to be due the Choctaws and Chickasaws under the act of the Fifty-first Congress of March 3, 1891, and to it added this clause:

> "*Provided, however,* That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interests in the lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (27 Stats., 753.)

So if the Fifty-first Congress passed a law declaring that the part of the "leased district" occupied by the Cheyenne and Arapahoe Indians was, in the opinion of that Congress, ceded in trust by article third of the treaty of 1866, the next Congress, with the action of its predecessor full in view and with the intent to destroy any conclusions to be drawn from the prior act, distinctly said that it should not commit the Government for the rest of the "leased district," which included the lands in question here.

It is true the last act did not say the lands were not "ceded in trust," but it did say that the act of the Fifty-first Congress should not be a precedent by which the Government should be considered as admitting that the Government had as of right admitted that it owed the Choctaws and Chickasaws for the remainder of lands as having been ceded in trust. It meant this or nothing.

The act of the Fifty-second Congress thus intentionally

destroyed any legal inference to be drawn from the act of the Fifty-first Congress and left the treaty of 1866 untouched by the act of 1891, and as though that act had never been passed. The act of 1891 did declare that the part of the "leased district" held by the Cheyenne and Arapahoe Indians had been ceded in trust; but the act of 1893 purposely repudiated any conclusion to be drawn from the prior act that the rest of the leased district was so ceded in trust.

It therefore seems that when the counsel insist that the act of 1891 is *in pari materia* with the treaty of 1866, and that this court should on that account declare that the treaty of 1866 was a cession in trust as to the lands in question, and that hence the United States should pay the Choctaws and Chickasaws for their supposed interest in the rest of the leased district, is to demand of this court on account of the act of 1891 to admit a liability which the act of 1893 distinctly declares should not be inferred. At every point in this case the claimants are asking this court to array itself in their behalf against established law.

In Hadden vs. Barney, 5 Wall., 107, Field, J., said:

> "What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of a court in the interpretation of a statute."

So no inference can be drawn from these acts of Congress. It is the duty of the legislature to enact laws not to interpret and expound them, and in this case Congress has declared itself both ways.

The doctrine of *in pari materia* only applies when the action of the legislature has been uniform.

Merret vs. Cannon, 137 U. S., 551.

So, too, the argument advanced that the departmental construction should be considered. Mr. Justice Brown delivering the opinion of this court in the case of United States vs. Tanner, 147 U. S., 6613, said: "It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material," and again this court said in the case of United States vs. Graham, 110 U. S., 219, 221.

> Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid. The cases this affect are numerous. (Edwards' Lessee v. Darby, 12 Wheat., 206; United States v. Temple, supra; Swift Co. v. United States, 105 U. S., 691; Ruggles v. Illinois, 108 U. S., 526.)

So it would seem that the various acts of Congress and the various rulings of the Department of the Interior are irrelevant and amount simply to the opinion of individuals and have no binding force, and are not properly in evidence in this cause.

i. *This Court has no right under the act giving it jurisdiction to require the defendants, as a condition precedent to a decree in their favor, to execute a quit-claim of all their rights to all other lands in Texas, Louisiana, etc., as suggested by the attorney for the United States.*

The learned counsel for the Government in his most thorough brief concedes us the judgment of this court, but couples it with the provision that we give a quitclaim to the United States of all our rights, whatever they may be, in all other lands everywhere. If the defendants have any such claims, they have the right to present them to Congress for action. As a matter of right, if we are entitled to the lands in dispute the court should so decide and we should have an unconditional decree for them, but for this court to say that we are entitled to these lands, and to add that we are entitled to nothing else from the United States, is to enlarge the scope of the jurisdictional act.

That act, it is true, says that the court shall "try and determine all questions that may arise on behalf of either party in the hearing of said claim;" but that language means all questions on the hearing of "said claim" in respect simply to the territory described in the act, in the petition, and in the answer. No other "claim," no other territory, is referred to in the act.

Surely the court, if it should decide for the claimants, would not be justified in a proviso to its decree declaring that the rights of the claimants to the residue of the "leased district" were by it forever denied; but the agreement of 1891, which is recited in and a part of the jurisdictional act of 1895, bears for us this saving clause in Article VI as follows:

> "It is further agreed that there shall be reserved to said Indians the right to prefer against the

> United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement."

We claim our "unlettered" rights to this part of the agreement.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE CHOCTAW AND CHICKASAW NATIONS ARE THE OWNERS OF THE REMAINDER IN SAID LANDS AFTER SATISFYING THE PROVISIONS IN FAVOR OF THE WICHITA AND AFFILIATED BANDS OF INDIANS IMPOSED BY SAID TRUST.

As was the second assignment of error a corollary of the first, so is this of the third. If the treaty of 1866 was an absolute cession of the Leased District, free from any trust, as we contend, then the Choctaw and Chickasaw nations retained no interest whatever in the said lands, and are not the owners of the remainder.

CROSS-APPEAL OF THE CHOCTAW AND CHICKASAW NATIONS.

From so much of the judgment rendered in this cause as found in favor of the defendants (the United States and the Wichita and affiliated bands of Indians), the Choctaw and Chickasaw nations have appealed to this court. (Rec., p. 444.)

As error these nations assign that the court erred in decreeing one hundred and sixty acres of the land to each member of the Wichitas and affiliated bands of Indians. (Rec., p. 447.)

To this assignment of error we submit that the Court of Claims had no jurisdiction to do otherwise, and that this finding, as we have already stated, was a gratuity. By Article I of the agreement of 1891, the Wichita and affiliated bands of Indians ceded to the United States all their claim, title and interest to and in the Wichita Reservation, the lands at issue in the cause now before the court.

Article II of the same agreement provides as follows:

> In consideration for the cession recited in the foregoing article, the United States agrees that out of the said tract of country there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land, in manner and form as follows:

And the act proceeds to set out how the land shall be divided and selected by the individual Indians, infant and adult.

Article III provides that these allotments shall be selected within ninety days after the ratification of the agreement by Congress, and Article IV, that when selected the titles shall be held in trust for the allottees for twenty-five years, as is usual in such cases.

Article V has already been quoted in this brief (page 7), and provides for the submission to Congress of the question upon which the Cherokee Commission had been unable to agree with the Indians, that of compensation for the surplus lands.

The act approved March 2, 1895, under which this court

derives jurisdiction in this cause, "approved, ratified, and confirmed" this agreement, and the same immediately went into effect by the terms of Article VIII.

By this ratification was placed in the hands of the executive the power to immediately allot to the Indians 160 acres of land each. The same act conferred jurisdiction on the Court of Claims in the following terms:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

If this jurisdictional act gave power to the Court of Claims to determine whether the Wichita and affiliated bands of Indians should receive their allotted lands, then, after the years of delay incident to the litigation herein (just five years have already elapsed) it would be within the power of that court to take away those allotments after they had been determined upon, and the Indians had constructed impovements thereupon. Such a ridiculous provision would be unheard of and simply needs to be stated to the court itself to refute any arguments put forward in its behalf. Whatever, therefore, may be the equitable right

of the Choctaw and Chickasaw nations to object to allotments being granted to the Wichitas and affiliated bands, we submit that nowhere in the act of March 2, 1895, is jurisdiction reposed either in this court or the court below to consider that right, and that the said cross-appeal should be dismissed.

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JOSIAH M. VALE,
Attorneys for Wichita and Affiliated Bands of Indians.

PHILIP WALKER,
WILLIAM C. SHELLEY,
Of Counsel.

EXPLANATION.

Quapaw Cession to U. S. . . . . ———

U. S. Cession to Choctaws . . . . . ———

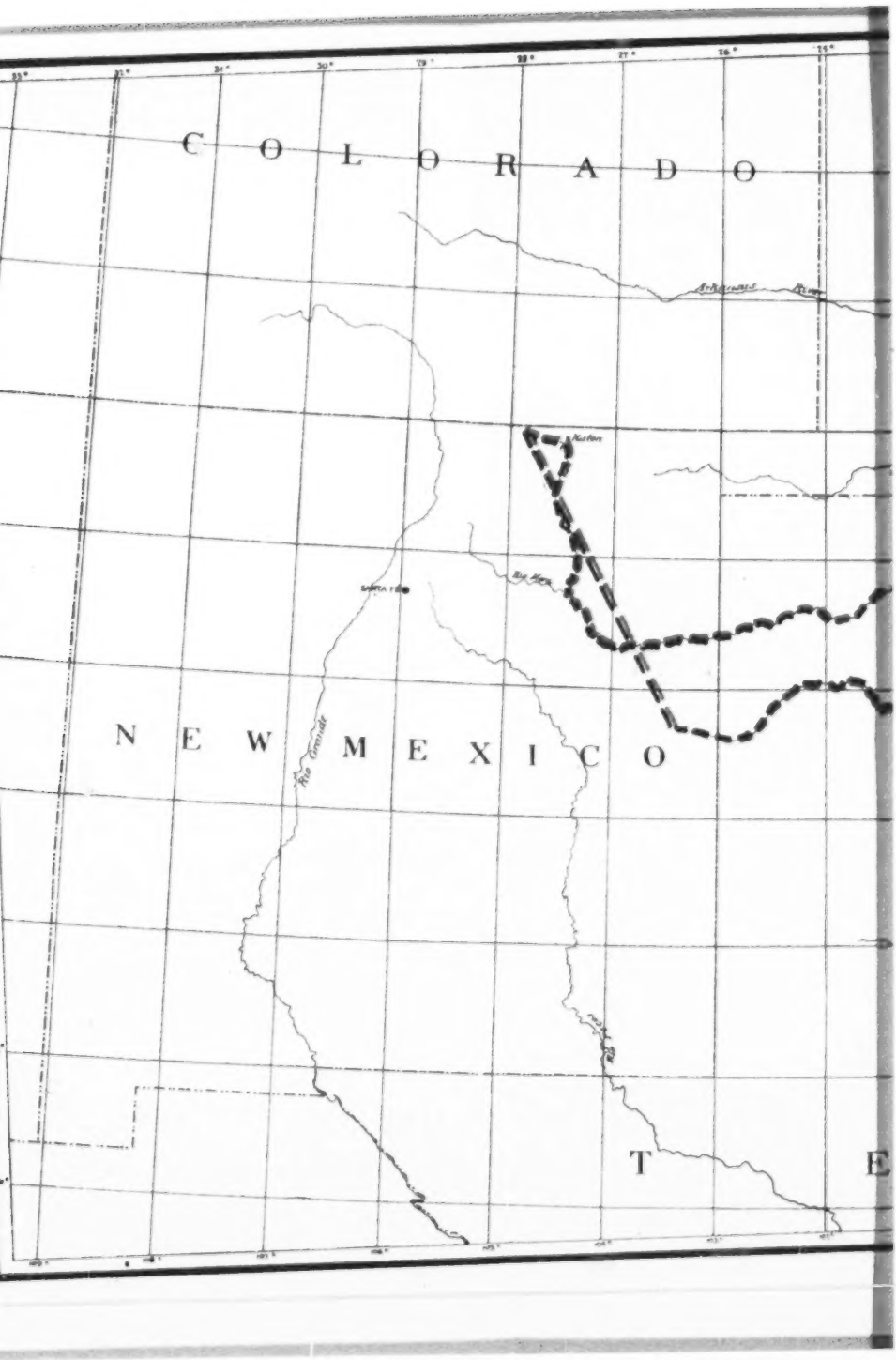
Limits of western part of said Cessions as claimed by Choctaws and Chickasaws .. . . . . – – – –

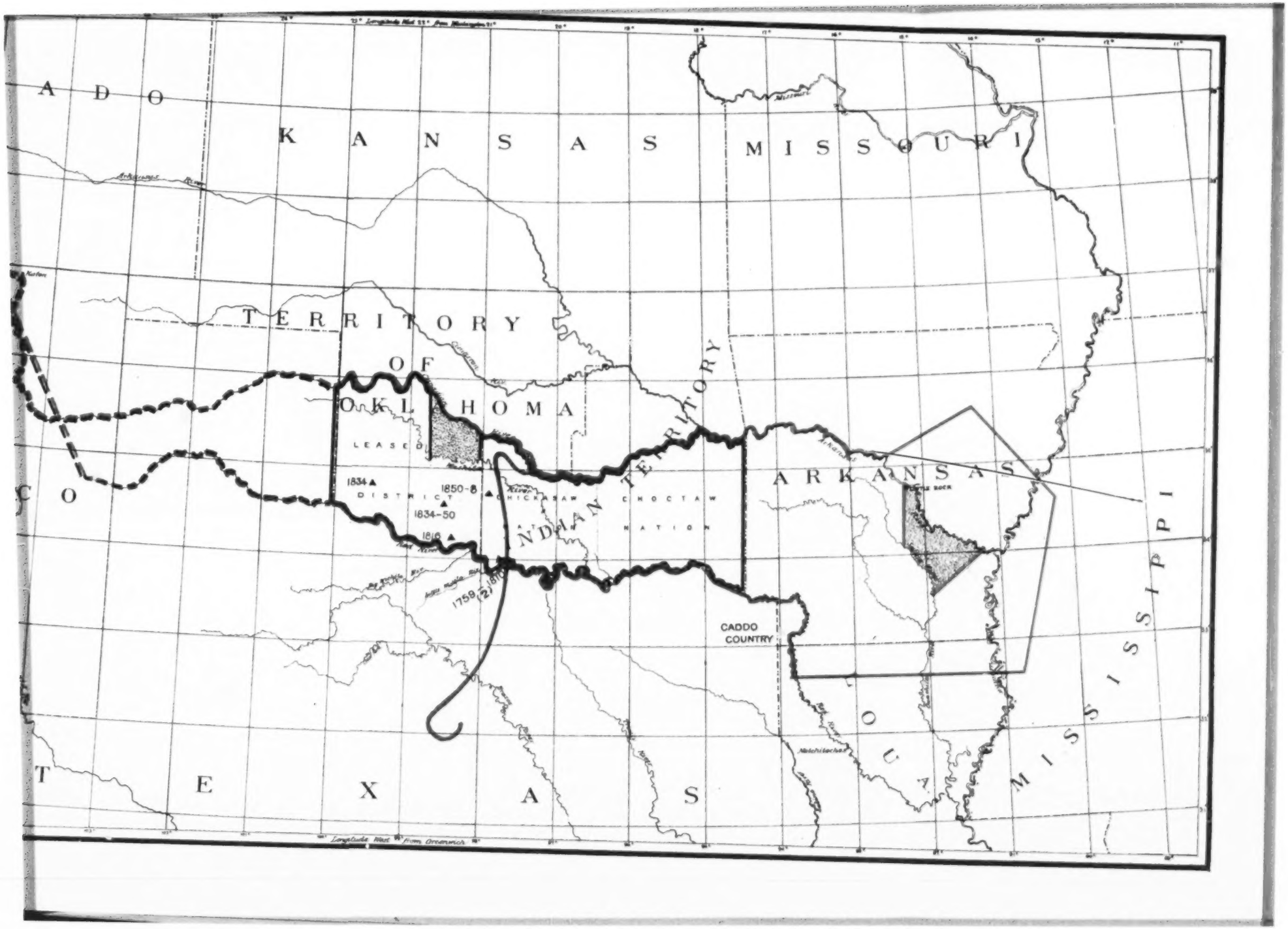
Western limits of Cross Timbers . . . . . ———

Quapaw Reservation containing all their Villages in 1818 . . . . .

Wichita Reservation, 1872 . . . . .

Wichita Villages, with date of occupation . . . ▲ 1834.


COLORADO
NEW MEXICO
Santa Fe
Big Hole
Rio Grande
T
E


A D O
K A N S A S
M I S S O U R I
T E R R I T O R Y
O F
O K L A H O M A
LEASED
1834
DISTRICT
1850-8
1834-50
1816
CHICKASAW
CHOCTAW
NATION
INDIAN TERRITORY
ARKANSAS
LITTLE ROCK
CADDO
COUNTRY
C O
T E X A S
L O U I S I S S I P P I
Missouri
Arkansas River
Red River
Canadian River
Washita River
Big Blue River
Little Washita River
Red River
Natchitoches
1759
(2) 1819
Longitude West from Greenwich